Supreme Court, U.S.
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**In The**

**Supreme Court Of The United States**

October Term, 2003

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**Dr. Marvin Frandsen,** ***Petitioner***

**v.**

**Department of Environmental Protection, State of Florida,** ***Respondent***

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On Petition for Writ of Certiorari
To the First District Court of Appeal
for the State of Florida

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Is Florida Administrative Code 64D-2.014(18) - the 'Free Speech Rule' that governs all First Amendment activities in Florida state parks - facially constitutional?

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## FLORIDA ADMINISTRATIVE CODE RULES


Florida Administrative Code 62D-2.014(18) *passim*

## OPINIONS BELOW

The final order and opinion of the Division of Administrative Hearings of the State of Florida is given at A. 30-60. The final order and opinion of the First District Court of Appeal, State of Florida, is given at A. 76-81. The Order of the First District Court of Appeal, State of Florida, denying Petitioner's Motion for Rehearing and Rehearing En Banc is given at A. 82. The Order of the Florida Supreme Court denying review to Petitioner is given at A. 83. (The Appendix is cited to as A.)

## JURISDICTION

The order sought to be reviewed is the final order of the First District Court of Appeal, State of Florida, entered on September 12, 2002. Petitioner's motion for rehearing and rehearing en banc was denied on November 6, 2002. Petitioner filed a Notice of Appeal to the Florida Supreme Court on the timely filing date of December 3, 2002 with a timely filing date of December 10, 2002 for a required brief arguing that the Florida Supreme Court had jurisdiction under the Florida Constitution's restrictive conditions.

The Florida Supreme Court determined it did not have jurisdiction to review the case and denied review on May 7, 2003.

Jurisdiction to review this case is vested in this Court via 28 U.S.C. § 1257(A).

## CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the

people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution, section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTORY PROVISIONS

§ 120.56(3), Florida Statutes, is given at A. 1.

§ 120.569, Florida Statutes, is given at A. 1-6.
§ 120.57, Florida Statutes, is given at A. 6-15.
§ 120.68, Florida Statutes, is given at A. 15-19.
§ 258.007(2), Florida Statutes, provides:

> The division has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement provisions of law conferring duties on it, and the violation of any rule authorized by this section shall be a misdemeanor and punishable accordingly.

## REGULATORY PROVISIONS

Florida Administrative Code 62D-2.014 is given in entirety at A. 19-27.

The regulation being challenged here, Florida Administrative Code 62D-2.014(18)(hereafter 'Rule'), provides:

> Free Speech Activities. Free speech activities include, but are not limited to, public speaking, performances, distribution of printed material, displays, and signs. Free speech activities do not include activities for commercial purposes. Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. Free speech activities shall not create a safety hazard or interfere with any other park visitor's enjoyment of the park's natural or cultural experience. The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity.

## STATEMENT OF THE CASE

Part 1: Nature of Case

This case is a facial constitutional challenge to a rule of the Respondent, Department of Environmental Protection, State of Florida. Said rule, Florida Administrative Code 62D-2.014(18))('Rule') regulates all First Amendment activity conducted within Florida's state parks.

Part 2: Respondent

Respondent is the Department of Environmental Protection, State of Florida (hereafter 'DEP'). The DEP is an agency of the State of Florida which manages and operations state parks through its Division of Recreation and Parks (A. 34-35).

The DEP manages the fourth largest state park system in the nation, consisting of 155 state parks comprising over half a million acres (A. 35). Florida state parks see about 16 million visitors per year (A. 35).

Part 3: Petitioner & Circumstances of Case Beginning

Petitioner is Dr. Marvin Frandsen (hereafter 'Frandsen'), a citizen of the United States and of the State of Florida (A. 33).

Frandsen is a political activist who wishes to communicate with the public in state parks concerning general political and social issues (Tr. at 418, 463). Frandsen is a member of Tampa Area Naturists, a volunteer nonprofit advocacy group (Tr. at 446).

Frandsen's desired methods of communication include handing out literature, participating in theatrical and dramatic presentations, political demonstrations, display of banners and signs, display of culture and art, conducting expressive parades, and so forth (Tr. at 418). Frandsen also wishes to be an audience member for the similar free speech activities of others (Tr. at 41, 453-454, 458, 462).

Frandsen specifically wishes to advocate for limited, designated beachfront areas within state parks where citizens can recreate sans swimsuits (A. 33-34, Tr. at 441-442). This cause is a source of tension with the DEP (Tr. at 438-439).

On 28 October 2000 Frandsen sent a coordination letter to the DEP park manager at Honeymoon Island State Park, Florida. This letter summarized several planned free speech activities on the date of 2 December 2000 for a small group of 15-20 persons. On 29 October 2000 Frandsen amended his coordination letter to include the use of sound amplification (Tr. at 420).

Frandsen received no response to his coordination letter. On 20 November 2000 Frandsen sent a second coordination letter to said park manager. This second letter likewise produced no response from the park manager.

On 28 November 2000 the DEP responded not through its park manager but via attorneys at DEP's Division of Recreation and Parks headquarters. Said attorneys represented the DEP in placing several time, place and manner restrictions on Frandsen's planned free speech activities. Of interest to this case was the imposition of a complete ban on sound amplification (A. 28-29) issued under authority of the Rule via the Rule's public enjoyment clause (Tr. at 334, 340, 368).

The DEP stated that its park manager would contact Frandsen "as soon as possible." No contact occurred. As a result Frandsen was left in a state of uncertainty (Tr. at 422-423). Ultimately because Frandsen considered the DEP restrictions to be untimely , unworkably severe, and ambiguous to cause fear and uncertainty over the speech restriction situation, Frandsen canceled the planned free speech activity (Tr. at 419-420, 430, 458).

(The transcript of the final hearing held before the Division of Administrative Hearings, State of Florida, May 30-31, 2001, is cited to as Tr.)

Part 4: Meaning of the Rule

The Rule is intended to implement an explicit DEP policy to welcome free speech activities in state parks (A. 37). The Rule is further intended to serve as notice to the public and DEP staff that First Amendment activity in state parks is OK, allowable and acceptable (A. 37).

DEP employees and citizens understand the Rule only via the text of the Rule. No other interpretive aids have

been promulgated by the DEP (A. 39).

The Rule's sweep is very broad. The Rule is intended to apply to anything covered by the First Amendment, whether it be oral, written or symbolic conduct, whether engaged in by a group or a single individual (A. 37). Because virtually any and every activity in state parks includes some form of free speech, nearly all activities in state parks are therefore subject to the Rule (A. 37).

The definition of a 'safety hazard' is very broad (A. 38). The scope of 'safety hazard' is ultimately limited only by the fairness and personal judgment of a park manager or park police officer (Tr. at 241, 374, 375, 403-405).

The definition of 'interfere with any other park visitor's enjoyment of the park's natural or cultural experience' is any activity which through visual or noise or whatever else it might be, takes away serenity or enjoyment (A. 37-38, Tr. at 509). Interference with public enjoyment can include general discomfort for any reason (Tr. at 274), and can range from extreme to "very minor" (Tr. at 535). Visitor expectations of enjoyment are highly diverse, with some visitors more sensitive than others (Tr. at 308). Potentially there is not anything that a speaker might do anywhere in a park that might not interfere with someone's enjoyment of the park (Tr. at 55).

The definition of 'park visitor use pattern' and 'other visitor use activity' are all-encompassing terms for everything that is happening in a park (A. 38, Tr. at 350). There are no activities in a park which do not constitute a 'park visitor use pattern' or an 'other visitor use activity.' (Tr. at 376).

Part 5: How DEP Applies the Rule

**The Rule itself does not state, provide for or cause any specific restriction to be placed on a free speech activity. The Rule acts by delegating authority to park managers and park police to create and implement all specific restrictions on speech (A. 38-39).**

**Each determination of restrictions to be placed on speech is made by DEP park managers or park police on an *ad hoc*, case-by-case basis.** DEP discretion is limited only by

the criteria stated within the Rule (A. 39). DEP employees never publicly post or otherwise publicly provide any standing restrictions on free speech activities (A. 38-39).

Prior contact with a park manager is not legally required by the Rule before one may engage in a free speech activity (A. 39). However the only means by which speakers can determine what restrictions they will face is via prior contact with a park manager (A. 39-40).

The Rule does not state any time limit within which park managers must respond to a speaker's request to know what restrictions will be levied on an activity (A. 40). As a result there are no limits on a park manager's discretion as to when s/he will respond to a speaker's request (Tr. at 208). Although a 2-3 week period is "typical", if "complexities" arise then the DEP's response may be delayed to an undetermined later time, a period which may expand into months (A. 40, Tr. at 208, 209)(Court Record at 346-351, 388-389).

In the face of DEP non-response speakers are in a legal sense free to conduct their free speech activity without waiting (A. 40, Tr. at 209). However these persons do as at risk of unknown on-the-spot restrictions being imposed under color of the Rule (Tr. at 269).

Part 6: How DEP Regulates Non-Speech Conduct

DEP does not rely on an *ad hoc*, case by case approach when regulating non-speech conduct. DEP regulation of non-speech conduct is accomplished by creating generally applicable rules and regulatory decisions which apply to everyone and which are priorly noticed to the public (A. 19-27, 36, 75).

Part 7: DEP Power to Control Speech Frequency and Duration Under the Rule

DEP may limit speech to a frequency of once a year or even once every 10 years (Tr. at 237-238).

DEP may limit speech to a duration of one minute or less (Tr. at 239).

DEP power to impose restrictions on speech is limited only by the judgment and fairness of the park manager (Tr. at 240-241).

Part 8: DEP Regulation of Sound Amplification Under Color of the Rule

The DEP does not ban sound amplification as a general practice (Tr. at 32-33).

DEP bans of sound amplification are discretionary edicts conducted on a case-by-case basis (Tr. at 327) based on the park manager's personal assessment of the impact on public enjoyment, tranquility and serenity (e.g. when the DEP believes a park visitor is or may become annoyed) (Tr. at 221-222, 367-370), possible impact on wildlife (Tr. at 221, 327, 328), and in general a park manager's own judgment of the "fairness" of his/her order to ban sound amplification (Tr. at 206).

The DEP allows the impromptu use of sound amplification at the Honeymoon Island State Park where this case began (Tr. at 513-514). DEP allowance of sound amplification includes recreational radio playing on the beach, the same setting as Frandsen's planned free speech activity (Tr. at 370).

The DEP has no record of public complaints in response to the use of amplified sound during demonstrations, rallies, plays, and similar free speech activities conducted in state parks (Tr. at 433-435, Court Record at 210).

Part 9. Chilling and Content Restriction of Speech Due to DEP Delay

Speaker witnesses testified that speakers who wish to conduct rallies, demonstrations, parades, theatrical events or other organized free speech activities may have their speech impeded and chilled by uncertainties about which restrictions will be faced under the Rule. For example, logistical issues in practical terms may need to be resolved within a reasonable time prior to conducting the activity so that the group can organize the activity and communicate within and outside the group to potential audience members (Tr. at 94, 95, 419).

Speech is chilled because of uncertainty as to permissible location, permissible time duration, whether sound amplification may be used, whether or not facilities

and space will be available, and whether or not speakers may run afoul of the public enjoyment clause of the Rule (Tr. at 161-162, 439, 532, 533).

Risk and uncertainty impedes a speaker's ability to reach an audience (Tr. at 422, 423). Uncertainty and risk causes speakers to act conservatively and restrict which messages will be communicated and what activities will be conducted, to the point where the level of fear and uncertainty will make the difference between successfully conducting a free speech activity or giving up entirely (Tr. at 419, 421-423).

Part 10: DEP Enforcement Policies

Violation of any restriction placed on First Amendment activities under color of the Rule is a second degree misdemeanor (§ 258.007(2), Florida Statues, Tr. at 335). Violations may be enforced by arrest (Tr. 218, 374, 401).

Enforcement is conducted by DEP's Division of Law Enforcement ("park patrol") (Tr. at 258).

When a park manager believes a violation of restrictions placed under color of the Rule has occurred s/he may call the park patrol to make an arrest (Tr. at 236, 400). When the park patrol arrives, a statement by a park manager that his/her restrictions are being violated constitutes sufficient cause for an arrest (Tr. at 406).

The park patrol will also respond to citizen complaint (Tr. at 405). A single complaint is sufficient to trigger enforcement (Tr. 309). Park patrol officers also make routine patrols which could independently result in arrests for violation of restrictions placed via the Rule (Tr. at 406).

Actual arrest is not automatic but depends on a discretionary assessment of the conduct and situation by the park patrol officer (Tr. 400, 401, 403).

The park patrol officer's decision to arrest or not would include looking at the text of the Rule and making a judgment concerning all of the components of the Rule. This would include the park patrol officer making an assessment of visitor use patterns (Tr. at 403), the public enjoyment clause (Tr. at 402), and an assessment of the existence of a safety hazard as per the park patrol officer's own judgment

and discretion (Tr. at 404-405). These determinations would depend on the officer's weighting of a number of factors including his or her personal assessment of traffic patterns, time of day, and the officer's estimation of the possibility or probability of user conflict (Tr. at 410-411).

Park patrol practice is to "educate" and "warn" prior to making an arrest. An arrest is a final option that is conducted on a case-by-case basis (Tr. at 411, 437-438).

Part 11: Citizen Recourse

If a park manager or park police officer's fairness or reasonableness is contested by a citizen an internal review may occur but the final decision is made only according to the judgment of the DEP. The only remaining recourse for a citizen is to initiate formal proceedings in the Division of Administrative Hearings (A. 40-41, 58-59). In any such proceeding the burden of proof is on the petitioner, not the government (A. 10, 17-18, 41).

Part 12: Proceedings in Lower Courts

This case began as a rule challenge in Florida's Division of Administrative Hearings (DOAH) pursuant to § 120.56(3), Florida Statutes (A. 1).

Because DOAH is a state executive branch agency DOAH may not hear constitutional challenges. As per the direction of the Florida Supreme Court in Key Haven v. Bd. of Trustees of Internal Imp., 427 So.2d 153, 158 (Fla. 1982), if a case begins in state administrative court then all state and federal constitutional challenges must be raised for the first time on appeal to a District Court of Appeal.

Frandsen's brief to the lower court (Florida First District Court of Appeal) raised the following federal constitutional challenges (A. 61-74):

a. The Rule is facially unconstitutional for violating U.S. Constitutional guarantees of due process.

b. The Rule is facially unconstitutional for violating U.S. Constitutional standards for proper delegation of authority to enforcement agencies and individuals.

c. The Rule is facially unconstitutional due to allowing content-based restrictions on speech.

d. The Rule is facially unconstitutional under the 1st,

5th and 14th Amendments due to allowing excessive discretion.

e. The Rule's statutory language is facially unconstitutional due to excessive vagueness and discretion.

f. The Rule is unconstitutionally overbroad under the 1st, 5th and 14th Amendments due to delegating the power to impose unconstitutional prior restraints while failing to provide required prior restraint due process safeguards.

In response to Frandsen's challenge (c) above regarding overt content-based restrictions, the DEP agreed that Rule language could be construed to improperly allow DEP employees to restrict speech based on speech content and audience reaction (DEP Answer Brief p. 24). DEP urged the lower state court to narrowly construe the Rule to preclude overt content discrimination (DEP Answer Brief p. 25).

The lower state court accepted Respondent's invitation to narrowly construe the Rule to exclude overt content discrimination including public emotional reaction to speech content (A. 80-81).

The lower state court briefly addressed Petitioner's prior restraint challenge (f) (A. 78).

Most of the lower state court opinion treated the Rule under the standard three pronged time, place and manner analysis test (A. 78-81), even though the Rule places no specific restrictions on speech of itself (Part 5 above), but only delegates such power .

Otherwise the lower state court never explicitly addressed Petitioner's constitutional challenges (a), (b), (d) and (e) above. The lower state court only *carte blanche* held the Rule facially constitutional (A. 81).

Frandsen timely filed a Motion for Rehearing and Motion for Rehearing En Banc. The lower state court denied this motion on November 6, 2002. (A. 82). Frandsen timely filed a Notice of Appeal and jurisdictional brief with the Florida Supreme Court. The Florida Supreme Court denied review on jurisdictional grounds on May 7, 2003 (A.83).

## ARGUMENT

### I. FLORIDA STATE PARKS ARE TRADITIONAL OR DESIGNATED PUBLIC FORA

This Court has long emphasized the "central importance of protecting speech on public issues" which as "led us to scrutinize carefully any restrictions on public issue picketing." Boos v. Berry, 485 U.S. 312, 318 (1988). This protection is at its highest concerning speech "on public streets and sidewalks, traditional public fora that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' " Id. at 318.

This Court has held that speech conduct, e.g. public issue picketing, is "an exercise of ... basic constitutional rights in their most pristine and classic form" which "has always rested on the highest rung of the hierarchy of First Amendment values." Carey v. Brown, 447 U.S. 455, 466 (1980). Because our society is becoming more insular the need to protect free speech rights in "public places where traditional modes of speech and forms of expression can take place" is more essential than ever. United States v. Kokinda, 497 U.S. 720, 737 (1990)(Kennedy, J., concurring).

All public parks and roads - including roads inside of public parks - are quintessential traditional public fora, wherein free speech "from ancient times, has been a part of the privileges, immunities, rights and liberties of citizens." Hague v. CIO, 307 U.S. 496, 515 (1939).

This Court has made it clear that which government entity may happen to own a public forum, e.g. a park, is irrelevant for public forum purposes. *Hague, supra* at 515 ("Wherever the title of streets and parks may rest ...") United States v. Grace, 461 U.S. 171, 177 (1983)("streets, sidewalks, and parks, are considered without more, to be 'public forums.'") Frisby v. Schultz, 487 U.S. 474, 481 (1988) ("No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public

fora.")

A public forum (e.g. a road or sidewalk) does not lose public forum status if it abuts nonpublic forum land. *Grace,supra* at 180.

The Eleventh Circuit has held that Florida state parks are traditional public fora. Naturist Society v. Fillyaw, 958 F.2d 1515, 1521-1523 (11th Cir. 1992). See also U.S. v. Frandsen, 212 F.3d 1231, 1237 (11th Cir. 2000).

Even if *arguendo* the state parks are not traditional public fora, the DEP enacted the Rule to give notice to the public and its own staff that free speech events are welcome in state parks (A. 39)

The DEP's intentional opening of the state parks to free speech activities gives the state parks designated public forum status. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)(municipal auditoriums and theaters were public fora because they were dedicated to expressive activities); Madison Joint School District v. Wisconsin Employment Relations Comm'n, 428 U.S. 167 (1976)(state statute providing for open school board meetings created public forum); Widmar v. Vincent, 454 U.S. 263, 267 (1981)(state university created forum through policy of accommodating student meetings); Community for Creative Non-Violence v. Turner, 893 F.2d 1387, 1391 (D.C. Cir. 1990)("the above ground free areas are designated public fora because, by promulgating the Regulation ... the WMATA has indicated an intent to open these areas to a wide range of free speech activities.")

In opening the state parks to expressive activity via enacting the Rule, the DEP is obligated to follow the rules of traditional public fora. Perry Ed. Assn. v. Perry Local Ed. Assn., 460 U.S. 37, 46 (1983)(a designated forum "is bound by the same standards as apply in a traditional public forum.") Krishna Society v. Lee, 505 U.S. 672, 678 (1992)("Regulation of such property is subject to the same limitations as that governing a traditional public forum.")

## II. RULE LANGUAGE IS VAGUE AND GRANTS UNBRIDLED DISCRETION

A. Safety Hazard Clause

As per the facts above, the Rule grants authority to the DEP to restrict speech activities on a case by case basis from causing a 'safety hazard' without further qualification. The determination of a 'safety hazard' is literally whatever a DEP park manager or park patrol officer wants to call a 'safety hazard.' No check or balance exists to restrain a DEP park manager or patrol officer from making trivial or pretextual determination of a 'safety hazard' in order to covertly suppress speech on the basis of content or hostility to the particular speakers.

Such unrestricted definition and application of a law is the *sin qua non* of unbridled discretion.

In contrast to the lower state court, this Court and the federal appellate courts have condemned standardless 'safety hazard' language as intolerable under the U.S. Constitution. Shuttlesworth v. Birmingham, 394 U.S. 147, 150 (1969)(Ordinance improperly allowed officials to restrain speech according to their own ideas of safety.) Fernandes v. Limmer, 663 F.2d 619, 631 (5th Cir. 1981)(Allowing an official to regulate speech depending on the official's ad hoc good reason perception of a 'direct and immediate danger or hazard to the public security, health, safety' held to constitute unbridled discretion.) Naturist Society, Inc. v. Fillyaw, 858 F.Supp. 1559, 1570 (S.D. Fla. 1994)(The phrase "present a clear and present danger to the public health and safety" ruled unconstitutionally vague and discretionary.) Rubin v. City of Santa Monica, 823 F.Supp. 709, 713 (C.D. Ca. 1993)("the ordinance is impermissibly vague as it does not define 'public nuisance' or 'detrimental to public health and safety.' "). Campbell v. Brevard County, No. 95-1219-CIV-ORL-22 (M.D. Fla. 1996)(Leaving determination of which facilities and which activities constitute a 'hazard' to official judgment constitutes unbridled discretion.)

B. Public Enjoyment Clause

As per the facts above, the Rule delegates authority to DEP employees to ban or restrict speech activities which 'interfere with any other park visitor's enjoyment of the park's natural or cultural experience.'

The lower state court narrowed the Rule's public enjoyment clause to be facially content neutral in that the public enjoyment clause can not be applied to public reactions which overtly stem from the content of the speech (A. 81-82).

The lower state court did not narrow the Rule's language to prevent covert discrimination against disfavored speech or speakers.

The DEP holds that loss of 'enjoyment' means anything and everything that bothers anyone, no matter how trivial (or pretextual), including a 'general discomfort' which anyone holds for any reason. The DEP holds that anything a speaker might do anywhere in a park might interfere with someone's enjoyment of the park.

The DEP holds that a single complaint from any visitor is sufficient to trigger enforcement under the Rule.

The vagueness of 'enjoyment', 'natural or cultural experience', and the lack of any standards for DEP decisions based on these undefinable criteria provides unbridled discretion to the DEP.

The public enjoyment clause of the Rule provides unlimited discretion to pretextually restrict speech because of covert hostility to speakers or the content of the speech. The DEP need merely, without any demonstrable foundation, assert that someone, somewhere might be adversely if minimally impacted by a free speech event.

In contrast to the lower state court, this Court and other federal courts have rejected standardless language similar to the public enjoyment clause of the Rule. Shuttlesworth v. Birmingham, 394 U.S. 147, 150 (1969) (Officials cannot be allowed to be guided only by their own ideas of "public welfare, peace, safety, health, decency, good order, morals or convenience."). LeFlore v. Robinson, 434 F.2d 933, 941 (5th Cir. 1970)('Peace and tranquillity' language

unconstitutional because terms could make criminal the peaceful expression of unpopular views.) Naturist Society v. Fillyaw, 858 F.Supp. 1559, 1570 (S.D. Fla. 1994)(Phrase "unreasonably impair the atmosphere of peace and tranquillity" found unconstitutionally vague and discretionary.) Connor v. Palm Beach County, 1996 WL 438779, p. 10 (S.D. Fla. 1996)(Phrase "cause interference to ... proper uses of a park or recreational area" unconstitutional for too much discretion.) Gilbreath v. State, 650 So.2d 10, 1995.FL.236, P. 38 (Fla. 1995)(Versuslaw)(" 'Offend' and 'annoy' are indefinite as to meaning and give rise to subjective vague connotations.")

The Rule's standardless language provides hostile members of the public unlimited power to pretextually institute a 'heckler's veto' by claiming some nebulous impact on their 'enjoyment.'

This Court has held a heckler's veto to be unconstitutional even where violence and disorder is threatened, much less some nebulous and poorly defined tranquility or enjoyment. Brown v. Louisiana, 383 U.S. 131, 135 (1966)(Holding that a definition which "would allow persons to be punished merely for peacefully expressing unpopular views" to be unconstitutional.)

In contrast to the lower state court, the federal appellate courts have found heckler's vetoes to be unconstitutional. Young v. City of Simi Valley, No. 97-56484, 2000.C09.0042344, P. 55 (9th Cir. 2000)(Versuslaw) (Government may not delegate to favored private parties the unfettered power to veto, without standards or reasons, another's right to engage in constitutionally protected freedom of expression.) Beckerman v. City of Tupelo, Mississippi, 664 F.2d 502, 509 (5th Cir. 1981)("it is not acceptable for the state to prevent a speaker from exercising his constitutional rights because of the reaction to him by others.") Berger v. Battaglia, 779 F.2d 992, 1001 (4th Cir. 1985)(Holding that "Government's instinctive and understandable impulse to buy its peace" may not lead to a heckler's veto.)

C. Suitability Clause

As per the facts above, the Rule allows DEP employees to restrict speech by self-determining on an *ad hoc* case by case basis the 'suitability of place and manner based on park visitor use patterns and other visitor activities at the time of the free speech activity.'

The DEP holds that the definitions of 'park visitor use pattern' and 'other visitor use activity' are simply all-encompassing terms for everything that is happening in a park.

The Rule provides no ascertainable standards whatsoever to limit DEP discretion in determining 'suitability of place and manner.'

Because the Rule lacks any ascertainable standards as to what is 'suitable' or not, and because the rule is applied *ad hoc* on a case by case basis without any other policy statements or refinements, the Rule's suitability clause is an all-purpose excuse for the DEP to restrict speech in a pretextual way so as to discriminate against disfavored speakers and message content.

## III. DEP HAS FAILED TO SHOW THAT TIME, PLACE AND MANNER REGULATION OF SPEECH IN STATE PARKS REQUIRES UNBRIDLED AD HOC DISCRETION

The issue of whether the DEP 'needs' the Rule's unbridled discretion to manage the 'complexity' of speech in state parks should be moot. The DEP's regulatory approach is flatly unconstitutional on its face.

This Court has already emphatically rejected the convenience of discretionary power as a valid regulatory approach to restrictions on speech. Shuttlesworth v. Birmingham, 394 U.S. 147, 150 (1969) (Officials cannot be allowed to be guided only by their own ideas of "public welfare, peace, safety, health, decency, good order, morals or convenience."). Forsyth Cy. v. Nationalist Movement, 120 L.Ed.2d 101, 111 (1992)(Discretion is inherently incompatible

with time, place and manner restriction of speech.)

Nevertheless because of the persistence of this issue in this case the following direct arguments will be stated.

Frandsen does not dispute that within the public forum of state parks the DEP may impose specific reasonable content-neutral time, place, and manner restrictions (when not giving itself unbridled discretion) to protect legitimate government interests.

Further, said restrictions may legitimately reflect the special characteristics of certain areas of parks, such as those with special conservation goals. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972)("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.") Naturist Society v. Fillyaw, 958 F.2d 1515, 1523 (11th Cir. 1992)(same, specifically as to beach areas of state parks).

That being said, the DEP may not by arbitrary fiat ('*ipse dixit*') erase the public forum status of any portion of a public forum. United States v. Grace, 461 U.S. 171, 180 (1983).

Frandsen does dispute the DEP's unsupported assertions that the unlimited discretionary authority granted in the Rule is necessary for the DEP to regulate speech activities in state parks.

The court record makes clear and the DEP admits that standing conduct rules effectively regulate a wide variety of conduct in the diverse state parks, e.g. park closures, traffic control, swimming, boating, fishing, hunting, alcohol, pets, merchandising, and aircraft (A. 20-27, 76).

In all of these situations state park situation diversity is accommodated by allowing park managers to make a generally applicable regulatory decision (not on a case by case basis) which is priorly posted or noticed in some way to the public, e.g. posted traffic control signs or area designations, or simply as standing rules in the Florida Administrative Code (A. 20-27).

The DEP has presented no competent substantial evidence as to why it must adopt a completely different regulatory approach to speech conduct as opposed to non-

speech conduct.

DEP defenses before the lower state courts of the necessity of unbridled discretionary power have nothing to do with regulating speech itself. Each issue could be (and often is already) addressed by generally applicable standing rules. All of the DEP examples argue to the opposite of the DEP's rationale for the Rule.

E.g., the carrying capacity of a dock (post a standing limit on the number of persons), full parks (close the 'in' gate, regardless of visitor purpose), blocking access of emergency vehicles (general traffic issue), trampling of vegetation or injury to animals (limit public access and/or educate), severe weather or tides (general safety for all, regardless of activity), traffic hazards (regulate traffic again, no connection to speech), loud music (regulate decibels for all as per appropriate park location), baptism with the alligators (entering the water in an area not designated), handing out flyers in the street (general conduct traffic issue again, flyers or no flyers). Even the proffered examples of user conflict (weddings, rallies, nature walks) present issues for which user purpose is irrelevant, and which can and should be addressed via first come, first serve or a reservation system.

In contrast to the lower state court, this Court has rejected government reliance on speech restrictions as a convenient means of regulating wider general conduct. Thompson v. Western States Medical Center, 122 S.Ct. 1497, 153 L.Ed.2d 563, 2002.SCT.0000071, P. 47 (U.S. 2002) (Versuslaw)("If the First Amendment means anything, it means that regulating speech must be a last -- not first -- resort. Yet here it seems to have been the first strategy the Government thought to try.")

Even where speech may be regulated under intermediate scrutiny this Court has "never accepted mere conjecture as adequate to carry a First Amendment burden", Watchtower v. Village of Stratton, No. 00-1737, 2002.SCT.0000117, P. 64 (U.S. 2002)(Versuslaw). Harms must be demonstrably real, not conjectural, and any regulation "must alleviate the harms in a direct and material way." Turner Broad. Sys., Inc., v. FCC, 512 U.S. 622, 664 (1994).

Any justification proffered by the Government to regulate speech must not merely be plausible speculation, but must be established by proven and presented fact. United States v. Treasury Employees, 513 U.S. --, 115 S.Ct. --, 130 L.Ed.2d 964, 985 (1995).

Also in contrast to the lower state court, the federal appellate courts have held that the government bears the burden of showing that its time, place and manner regulations are valid. Bay Area Peace Navy v. U.S., 914 F.2d 1224 (9th Cir. 1994)("The government bears the burden of proving that the 'narrowly tailored' and 'alternative communication' prongs are satisfied.") Phillips v. Borough of Keyport, 107 F.3d 164, 173 (3rd Cir. 1997)("[The government] must come forward with 'evidence of incidental adverse social effect that provides the important governmental interest justifying reasonable time, place and manner restrictions on speech or expressive conduct. ... It is the Borough that carries the burdens of production and persuasion here, not the plaintiffs.") Ass'n of Community Organizations for Reform Now v. Golden, Colorado, 744 F.2d 739, 746 (10th Cir. 1984) ("when a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality.") U.S. v. Doe, 968 F.2d 86, 90 (D.C. Cir. 1992)("In a First Amendment challenge, the government bears the burden of showing that its restriction of speech is justified under the traditional 'narrowly tailored' test.") Edwards v. City of Coeur D'Alene, No. 00-35537, 2001.C09.0000580, P. 42 (9th Cir. 2001)(Versuslaw)("the First Amendment demands that municipalities provide 'tangible evidence' that speech-restrictive regulations are 'necessary' to advance the proffered interest in public safety.")

This Court has invalidated regulations like the Rule which shift the burden of proving the necessity of a restriction from the government to the speaker. Speiser v. Randall, 357 U.S. 513, 524 (1958)("In civil cases too this Court has struck down state statutes unfairly shifting the burden of proof.")

If this Court has any doubt as to the facts, it should conduct an independent appellate review of the court record. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 500, fn. 16, 17 (1984). Hurley v. Irish-American Gay Group, 132 L.Ed.2d 487, 499 (1995).

## IV. THE RULE IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT BECAUSE THE LACK OF ASCERTAINABLE STANDARDS ALLOWS COVERT CONTENT DISCRIMINATION.

The first prong of the time, place and manner test is that time, place and manner restrictions on speech must be content neutral.

In contrast to the lower state court, this Court and the federal circuit courts of appeal have held that analysis of content neutrality does not end with purported facial neutrality. If the law allows unbridled discretion by officials then the danger of discriminatory enforcement makes the restriction unconstitutional.

Forsyth Cy. v. Nationalist Movement, 505 U.S. --. 112 S.Ct. --, 120 L.Ed.2d 101, 111 (1992)("A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.' ")

Lakewood v. Plain Dealer, 486 U.S. 750, 758 (1988)(Without express standards *post hoc* rationalizations and the use of shifting criteria are far too easy, making it difficult for any reviewing court to determine if an official is discriminating for illicit reasons.)

Gentile v. State Bar of Nevada, 501 U.S. 1030, 1051 (1991)("The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement.")

Cox v. Louisiana, 379 U.S. 536, 557 (1965)(Broad discretion "sanctions a device for the suppression of the

communication of ideas and permits the official to act as a censor.")

Crowder v. Housing Authority of City of Atlanta, 990 F.2d 586, 591 (11th Cir. 1993)("A restriction which vests unlimited discretion in a government actor, however, opens the way to arbitrary suppression of particular points of view. Such arbitrariness is inherently inconsistent with a valid time, place and manner regulation.")

Summum v. City of Ogden, No. 01-4022, 2002.C10.0000800, P. 63, 69 (10th Cir. 2002) (Versuslaw)(*Post hoc* rationalizations may obscure viewpoint discrimination. Without criteria to circumscribe official discretion, the potential for unconstitutional conduct, namely favoring one viewpoint over another, cannot be tolerated. This is true even where the government offers reasonable grounds for limiting access, and even in a nonpublic forum.)

Whether or not an an agency or official has actually abused a discretionary power over speech is constitutionally irrelevant. The mere existence of the power makes the law facially unconstitutional. NAACP v. Button, 371 U.S. 415, 438 (1963)("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.") Id. at 433. ("The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment Freedoms, the existence of a penal statute susceptible of sweeping and improper application ... These freedoms are delicate and vulnerable, as well as supremely precious in our society. *The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.*")(emphasis added). For Your Eyes Alone, Inc. v. City of Columbus, Georgia, No. 01-13317, 2002.C11.0000045, P. 48 (11th Cir. 2002)(Versuslaw)(Uncertainty as to the conduct of state agents implementing a statute can in itself chill future speech.)

In contrast to the lower state court ruling a federal circuit court has specifically held that park officials cannot be allowed to exercise discretionary power over speech in the name of park values and purposes. Women Strike for Peace

v. Morton, 472 F.2d 1273, 1291 (D.C. Cir. 1972)("those officials assure us that the discretion is exercised with an eye to the public interest and basic park values. But the Supreme Court has repeatedly held that such standards, even with official assurances of good faith, offer insufficient protection to First Amendment freedoms.") U.S. v. Doe, 968 F.2d 86, 90 (D.C. Cir. 1992)("Where constitutionally protected activity is implicated, we cannot simply defer to the Park Service's unexplained judgment.")

This Rule should be held facially unconstitutional because the lack of ascertainable standards and employment of subjective, *ad hoc* judgment in every case makes every application of the Rule invalid. United States v. Salerno, 481 U.S. 739, 745 (1987); City of Chicago v. Morales, 527 U.S. 41, 55 (1999)(A vague criminal law which contains no *mens rea* requirement and infringes on constitutionally protected rights is subject to facial attack.) Id. at 71. ("if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications.")(Justice Breyer, concurring).

## V. THE RULE IS UNCONSTITUTIONAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS BECAUSE LACK OF ASCERTAINABLE STANDARDS AND UNBRIDLED DISCRETION VIOLATES DUE PROCESS AND IMPROPER DELEGATION GUARANTEES

In multiple holdings this Court has been adamant that even outside of First Amendment jurisprudence the Rule's strategy of applying unascertainable standards on a case by case, *ad hoc* basis is facially unconstitutional.

Grayned v. City of Rockford, 408 U.S. 104, 109 (1972)("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.")

Smith v. Goguen, 415 U.S. 566, 575 (1974)("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their predilections. Legislature may not so abdicate their responsibilities for setting the standards of criminal law.") Id. at 575. (Lawmaking cannot be entrusted 'to the moment-to-moment judgment of the policeman on his beat.') Id. at 576. ("Where inherently vague statutory language permits such selective law enforcement, there is a denial of due process.") Id. at 578. ("This absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause. The deficiency is particularly objectionable in view of the unfettered latitude thereby accorded enforcement officials and triers of fact.")

Houston v. Hill, 482 U.S. 451, 466 (1987)(An ordinance is facially unconstitutional which "confers on police a virtually unrestrained power to arrest and charge persons with a violation.")

Kolender v. Lawson, 461 U.S. 352, 361 (1983)(holding a law "unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute.") Id. at

Recently in City of Chicago v. Morales, 527 U.S. 41 (1999) this Court held that a statutory strategy of *ad hoc*, case by case application of unascertainable standards and subjective judgment as to what constitutes a violation of the law is facially unconstitutional. Id. at 55. ("When vagueness permeates the text of such a law, it is subject to facial attack.") Id. at 56. (Facial unconstitutionality exists when a law "may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.") Id. at 58-59. ("If the police are able to decide arbitrarily which members of the public they will order to disperse, then the Chicago ordinance becomes indistinguishable from the law we held invalid in Shuttlesworth v. Birmingham") Id. at 60. (A law like the Rule is facially unconstitutional in setting a large net which

the courts are expected to sort out, because effectively "no standard of conduct is specified at all." Id. at 62. (Rejecting inherent subjectivity where application depends on officer at the scene.)

In *City of Chicago* this Court specifically rejected the Rule's strategy that an officer issuing an order to citizens constitutes proper notice of violation to citizens. Id. at 58-59. (Rejecting the doctrine that persons receiving notice via a police order constitutes fair notice.) Id. at 62. (Allowing arrest only after an order has been disobeyed "does not provide any guidance to the officer deciding whether such an order should issue.")

This Court has also held that the Rule's strategy of delegating policy making to officials who are expected to exercise their power on an ad hoc and subjective basis is an improper delegation of power to these officials, and thus facially unconstitutional. Grayned v. City of Rockford, 408 U.S. 104, 109 (1972)("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.")

## VI. THE RULE IS UNCONSTITUTIONAL UNDER THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS BECAUSE THE RULE IS NOT SPECIFIC

Within a First Amendment context this Court has been emphatic that laws regulating speech must be narrowly specific. Keyishian v. Board of Regents of New York, 385 U.S. 589, 604 (1967)("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.") NAACP v. Button, 371 U.S. 415, 438 (1963)("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.")

This Court has recently reemphasized the need for narrow specificity even outside of First Amendment

contexts. City of Chicago v. Morales, 527 U.S. 41, 72 (1999), quoting Coates v. Cincinnati, 402 U.S. 611, 614 (1971) made it clear that even for non-speech conduct the DEP must address legitimate government goals with narrow specificity: "The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. ... It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed."

Given the need for specificity under the Fifth and Fourteenth Amendments, a law which regulates speech as such must be even more strictly held to the requirement of specificity.

The Rule fails to meet the specificity requirement in all of its applications. The Rule is therefore invalid on its face.

## VII. THE RULE IS UNCONSTITUTIONAL BECAUSE PRIOR RESTRAINTS ARE ISSUED UNDER COLOR OF THE RULE

This Court has held that a danger of an unconstitutionally vague and discretionary law regulating speech is that prior restraints may be issued under color of the law. Broadrick v. Oklahoma, 413 U.S. 601, 612-613 (1973)(Holding a law unconstitutional because it "delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights.")

Prior restraints are the worst infringement on First Amendment rights. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 559 (1975)("prior restraints on speech ... are the most serious and least tolerable infringement on First Amendment rights.")

Prior restraints are presumed to be facially unconstitutional. Carroll v. Commissioners of Princess

Anne, 393 U.S. 175, 181 (1968). Even where the presumption of unconstitutionality is overcome, procedural safeguards must be in place to obviate the dangers of a censorship system. Id. at 181.

According to the DEP the Rule gives its officials power to limit a free speech activity to a time duration of a minute or less, or to a frequency of once a year or every 10 years. The situation "facts" supporting such an edict depend on DEP's subjective assessment of 'suitability' according to anything and everything going on in the park, or on subjective assessment of whether some person's 'enjoyment' might be adversely impacted to some trivial degree.

Such power to suppress speech is indistinguishable from prior restraint because it allows the DEP to effectively ban speech completely.

If a speaker accepts the Rule's invitation to contact the park manager in advance of the communication, the effective ban can be instituted in advance of the communication - thus putting the 'prior' in 'prior restraint.'

The record in this case unequivocally shows that the DEP issued a prior restraint under color of the Rule in the form of a discretionary ban on all sound amplification.

The record further shows this prior restraint was issued in advance of the communication, not as an on the spot in response to some abuse or harm that was actually occurring.

This Court has held that a ban on sound amplification which is levied or lifted at the discretion of an official is legally a prior restraint. Saia v. New York, 334 U.S. 558, 560-561 (1948)("The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and lengthy appeal. A more effective previous restraint is difficult to image." See also Cannabis Action Network, Inc. v. City of Gainesville, 231 F.3d 761, 771 (11th Cir. 2000)(same).

Nowhere does the Rule provide any procedural safeguard to "obviate the dangers of censorship" when DEP employees issue a prior restraint to a speaker. For example,

the Rule does not provide any time limit within which a park manager must respond to a request for applicable restrictions on speech. As the court record shows, the DEP may take days, weeks or months to reply. (If a speaker asks the DEP to lift a 10-year ban on a speech activity, when can the speaker know? And how is this power any different from a prior restraint permit scheme?)

## VIII. THE RULE'S DEFICIENCIES SHOULD BE CURED BY FACIAL INVALIDATION RATHER THAN CASE BY CASE ADJUDICATION

As discussed above the Rule abundantly meets the criteria for facial invalidation.

This Court has often held that vague rules which provide unbridled discretion to restrict speech should not be subject to a series of adjudications but should be invalidated in entirety. Board of Airport Commissioners v. Jews for Jesus, 482 U.S. 569, 576 (1987)("A series of adjudications limiting the application of the ordinance would be unacceptable because it would result in a chilling effect on protected speech during the pendency of judicial proceedings delineating the contours of the ordinance.") Baggett v. Bullitt, 377 U.S. 360, 373 (1964)("a vague law is not rendered more precise by virtue of a court having passed upon its application to particular facts. Rather, such a process merely shifts the exercise of impermissibly broad discretion from executive officials to judges, a shift that has no significance in First Amendment jurisprudence.")

This Court should be aware that the peculiarities of Florida state administrative courts and administrative law make any piecemeal as-applied adjudication in Florida state courts virtually impossible. Effectively no right of adjudication exists.

Because Frandsen's administrative rule challenge failed, the Rule has been pronounced as valid and legitimate under the Florida administrative law. Under this circumstance the only state court challenge possible is to file an "as-applied" challenge to the state agency action under

§120.569 and §120.57, Florida Statues (A. 41, 58-59).

Florida law forbids an administrative court from performing an independent fact finding role if the "fact" includes state agency discretion. Therefore in Florida state courts any review of DEP subjective assessments of "fact" when applying the rule will be unreviewable.

When a litigant appeals the administrative court decision then as per § 120.68(7)(b) and (e), Florida Statutes (A. 18), s/he will find that contrary to this Court's direction all "facts" which are DEP discretionary judgments will be automatically found in the favor of the state agency and will be unreviewable on appeal.

Cortes v. State Board of Regents, 655 So.2d 132, 1995.FL.954, P. 58 (Fla. 1st DCA 1995)(Versuslaw)("Because a reviewing 'court shall not substitute its judgment for that of the agency on an issue of discretion,' ... an agency rule that confers standardless discretion insulates agency action from judicial scrutiny.").

## IX. PETITIONER HAS STANDING TO RAISE FACIAL CHALLENGES TO THE RULE

The DEP stipulated to Frandsen's standing to conduct a rule challenge (A. 34). Under § 120.56(3), Florida Statutes (A. 1) only 'substantially affected' persons may challenge an agency rule. Therefore the DEP has already stipulated to the fact that Frandsen is substantially affected by the Rule.

As per the facts above, Frandsen was threatened with arrest in writing should he break any park rule, published or unpublished, including orders issued by the DEP under color of the Rule. Threat of self-censorship because of fear of DEP use and abuse of discretionary authority granted under color of the Rule is liberally attested in the record by Frandsen and other speaker witnesses as per the facts above.

Frandsen is not required to submit to arrest or direct personal threat in order to have standing to raise either facial or as-applied constitutional challenges. Babbitt v. Farm Workers, 422 U.S. 289, 298 (1979)("When contesting the constitutionality of a criminal statute, 'it is not necessary that

[the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.") ACLU v. The Florida Bar, 999 F.2d 1486, 1492 (11th Cir. 1992)("The alleged danger of this statute is, in large measure one of self-censorship; a harm that can be realized without an actual prosecution.") See also Harris v. McRae, 448 U.S. 297, 299 (1980); Hardwick v. Bowers, 760 F.2d 1202, 1204 (11th Cir. 1985), rev'd on other grounds, 478 U.S. 186 (1986). ("In some cases, the authentic interest of a plaintiff in engaging in the prohibited conduct can establish standing even though the only threat of enforcement by the State comes from the very existence of the statute.")

## X. CONCLUSION

This case concerns very fundamental questions about the extent of government *ad hoc* discretionary power to regulate speech under the 'time, place and manner' label in designated or traditional public fora.

Government officials should not have the power to intimidate and control speakers on the spot by summary creation of 'law' according to their subjective interpretations of imponderable criteria and moods. Hostile members of the public should not be able to likewise summarily by pretext veto speech.

The lower state court's ruling directly and openly conflicts with numerous rulings of this Court and the federal circuit courts of appeal.

WHEREFORE, Frandsen prays this Honorable Court will grant this Petition, find the Rule facially unconstitutional under the United States Constitution, and issue a Writ of Certiorari to the lower state court.

Dr. Marvin Frandsen, Petitioner, *pro se*

**No.**

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**In The**

**Supreme Court Of The United States**

October Term, 2003

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**Dr. Marvin Frandsen,** ***Petitioner***

**v.**

**Department of Environmental Protection, State of Florida,** ***Respondent***

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On Petition for Writ of Certiorari
To the First District Court of Appeal
for the State of Florida

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# APPENDIX OF

# PETITION FOR WRIT OF CERTIORARI

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## APPENDIX

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## § 120.56(3), Florida Statutes

(3) CHALLENGING EXISTING RULES; SPECIAL PROVISIONS.--

(a) A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule.

(b) The administrative law judge may declare all or part of a rule invalid. The rule or part thereof declared invalid shall become void when the time for filing an appeal expires. The agency whose rule has been declared invalid in whole or part shall give notice of the decision in the Florida Administrative Weekly in the first available issue after the rule has become void.

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## § 120.569, Florida Statutes

120.569 Decisions which affect substantial interests.--

(1) The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency, unless the parties are proceeding under s. 120.573 or s. 120.574. Unless waived by all parties, s. 120.57(1) applies whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, s. 120.57(2) applies in all other cases. Parties shall be notified of any order, including a final order. Unless waived, a copy of the order shall be delivered or mailed to each party or the party's attorney of record at the address of record. Each notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57, or s. 120.68; shall indicate the procedure which must be followed to obtain the hearing or judicial review; and shall state the time limits which apply.

(2)(a) Except for any proceeding conducted as prescribed in s. 120.56, a petition or request for a hearing under this section shall be filed with the agency. If the agency requests an administrative law judge from the division, it shall so notify the division within 15 days after receipt of the petition or request. A request for a hearing shall be granted or denied within 15 days after receipt. On the request of any agency, the division shall assign an administrative law judge with due regard to the expertise required for the particular matter. The referring agency shall take no further action with respect to a proceeding under s. 120.57(1), except as a party litigant, as long as the division has jurisdiction over the proceeding under s. 120.57(1). Any party may request the disqualification of the administrative law judge by filing an affidavit with the division prior to the taking of evidence at a hearing, stating the grounds with particularity.

(b) All parties shall be afforded an opportunity for a hearing after reasonable notice of not less than 14 days; however, the 14-day notice requirement may be waived with the consent of all parties. The notice shall include:

1. A statement of the time, place, and nature of the hearing.

2. A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) Unless otherwise provided by law, a petition or request for hearing shall include those items required by the uniform rules adopted pursuant to s. 120.54(5)(b)4. Upon the receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains all of the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. The agency shall promptly give written notice to all

parties of the action taken on the petition, shall state with particularity its reasons if the petition is not granted, and shall state the deadline for filing an amended petition if applicable.

(d) The agency may refer a petition to the division for the assignment of an administrative law judge only if the petition is in substantial compliance with the requirements of paragraph (c).

(e) All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(f) The presiding officer has the power to swear witnesses and take their testimony under oath, to issue subpoenas, and to effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure, including the imposition of sanctions, except contempt. However, no presiding officer has the authority to issue any subpoena or order directing discovery to any member or employee of the Legislature when the subpoena or order commands the production of documents or materials or compels testimony relating to the legislative duties of the member or employee. Any subpoena or order directing discovery directed to a member or an employee of the Legislature shall show on its face that the testimony sought does not relate to legislative

duties.

(g) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

(h) Documentary evidence may be received in the form of a copy or excerpt. Upon request, parties shall be given an opportunity to compare the copy with the original, if available.

(i) When official recognition is requested, the parties shall be notified and given an opportunity to examine and contest the material.

(j) A party shall be permitted to conduct cross-examination when testimony is taken or documents are made a part of the record.

(k)1. Any person subject to a subpoena may, before compliance and on timely petition, request the presiding officer having jurisdiction of the dispute to invalidate the subpoena on the ground that it was not lawfully issued, is unreasonably broad in scope, or requires the production of irrelevant material.

2. A party may seek enforcement of a subpoena, order directing discovery, or order imposing sanctions issued under the authority of this chapter by filing a petition for enforcement in the circuit court of the judicial circuit in which the person failing to comply with the subpoena or order resides. A failure to comply with an order of the court shall result in a finding of contempt of court. However, no person shall be in contempt while a subpoena is being

challenged under subparagraph 1. The court may award to the prevailing party all or part of the costs and attorney's fees incurred in obtaining the court order whenever the court determines that such an award should be granted under the Florida Rules of Civil Procedure.

3. Any public employee subpoenaed to appear at an agency proceeding shall be entitled to per diem and travel expenses at the same rate as that provided for state employees under s. 112.061 if travel away from such public employee's headquarters is required. All other witnesses appearing pursuant to a subpoena shall be paid such fees and mileage for their attendance as is provided in civil actions in circuit courts of this state. In the case of a public employee, such expenses shall be processed and paid in the manner provided for agency employee travel expense reimbursement, and in the case of a witness who is not a public employee, payment of such fees and expenses shall accompany the subpoena.

(l) Unless the time period is waived or extended with the consent of all parties, the final order in a proceeding which affects substantial interests must be in writing and include findings of fact, if any, and conclusions of law separately stated, and it must be rendered within 90 days:

1. After the hearing is concluded, if conducted by the agency;

2. After a recommended order is submitted to the agency and mailed to all parties, if the hearing is conducted by an administrative law judge; or

3. After the agency has received the written and oral material it has authorized to be submitted, if there has been no hearing.

(m) Findings of fact, if set forth in a manner which is no more than mere tracking of the statutory language, must be

accompanied by a concise and explicit statement of the underlying facts of record which support the findings.

(n) If an agency head finds that an immediate danger to the public health, safety, or welfare requires an immediate final order, it shall recite with particularity the facts underlying such finding in the final order, which shall be appealable or enjoinable from the date rendered.

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**§ 120.57, Florida Statutes**

120.57 Additional procedures for particular cases.--

(1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT.--

(a) Except as provided in ss. 120.80 and 120.81, an administrative law judge assigned by the division shall conduct all hearings under this subsection, except for hearings before agency heads or a member thereof. If the administrative law judge assigned to a hearing becomes unavailable, the division shall assign another administrative law judge who shall use any existing record and receive any additional evidence or argument, if any, which the new administrative law judge finds necessary.

(b) All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative. When appropriate, the general public may be given an opportunity to present oral or written communications. If the agency proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut the material.

(c) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

(d) Notwithstanding s. 120.569(2)(g), similar fact evidence of other violations, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity. When the state in an administrative proceeding intends to offer evidence of other acts or offenses under this paragraph, the state shall furnish to the party whose substantial interests are being determined and whose other acts or offenses will be the subject of such evidence, no fewer than 10 days before commencement of the proceeding, a written statement of the acts or offenses it intends to offer, describing them and the evidence the state intends to offer with particularity. Notice is not required for evidence of acts or offenses which is used for impeachment or on rebuttal.

(e)1. Any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge.

2. The agency action shall not be presumed valid or invalid. The agency must demonstrate that the unadopted rule:

a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to authority derived from the State Constitution, is within that authority;

b. Does not enlarge, modify, or contravene the specific provisions of law implemented;

c. Is not vague, establishes adequate standards for agency

decisions, or does not vest unbridled discretion in the agency;

d. Is not arbitrary or capricious;

e. Is not being applied to the substantially affected party without due notice;

f. Is supported by competent and substantial evidence; and

g. Does not impose excessive regulatory costs on the regulated person, county, or city.

3. The recommended and final orders in any proceeding shall be governed by the provisions of paragraphs (k) and (l), except that the administrative law judge's determination regarding the unadopted rule shall not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law. In any proceeding for review under s. 120.68, if the court finds that the agency's rejection of the determination regarding the unadopted rule does not comport with the provisions of this subparagraph, the agency action shall be set aside and the court shall award to the prevailing party the reasonable costs and a reasonable attorney's fee for the initial proceeding and the proceeding for review.

(f) The record in a case governed by this subsection shall consist only of:

1. All notices, pleadings, motions, and intermediate rulings.

2. Evidence admitted.

3. Those matters officially recognized.

4. Proffers of proof and objections and rulings thereon.

5. Proposed findings and exceptions.

6. Any decision, opinion, order, or report by the presiding officer.

7. All staff memoranda or data submitted to the presiding officer during the hearing or prior to its disposition, after notice of the submission to all parties, except communications by advisory staff as permitted under s. 120.66(1), if such communications are public records.

8. All matters placed on the record after an ex parte communication.

9. The official transcript.

(g) The agency shall accurately and completely preserve all testimony in the proceeding, and, on the request of any party, it shall make a full or partial transcript available at no more than actual cost.

(h) Any party to a proceeding in which an administrative law judge of the Division of Administrative Hearings has final order authority may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order. A summary final order shall consist of findings of fact, if any, conclusions of law, a disposition or penalty, if applicable, and any other information required by law to be contained in the final order.

(i) When, in any proceeding conducted pursuant to this

subsection, a dispute of material fact no longer exists, any party may move the administrative law judge to relinquish jurisdiction to the agency. In ruling on such a motion, the administrative law judge may consider the pleadings, depositions, answers to interrogatories, and admissions on file, together with supporting and opposing affidavits, if any. If the administrative law judge enters an order relinquishing jurisdiction, the agency may promptly conduct a proceeding pursuant to subsection (2), if appropriate, but the parties may not raise any issues of disputed fact that could have been raised before the administrative law judge. An order entered by an administrative law judge relinquishing jurisdiction to the agency based upon a determination that no genuine dispute of material fact exists, need not contain findings of fact, conclusions of law, or a recommended disposition or penalty.

(j) Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized.

(k) The presiding officer shall complete and submit to the agency and all parties a recommended order consisting of findings of fact, conclusions of law, and recommended disposition or penalty, if applicable, and any other information required by law to be contained in the final order. All proceedings conducted pursuant to this subsection shall be de novo. The agency shall allow each party 15 days in which to submit written exceptions to the recommended order.

(l) The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state

with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

(m) If a recommended order is submitted to an agency, the agency shall provide a copy of its final order to the division within 15 days after the order is filed with the agency clerk.

(n) Notwithstanding any law to the contrary, when statutes or rules impose conflicting time requirements for the scheduling of expedited hearings or issuance of recommended or final orders, the director of the division shall have the authority to set the proceedings for the orderly operation of this chapter.

(2) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS NOT INVOLVING DISPUTED ISSUES OF MATERIAL FACT.--In any case to which subsection (1) does not apply:

(a) The agency shall:

1. Give reasonable notice to affected persons of the action of the agency, whether proposed or already taken, or of its

decision to refuse action, together with a summary of the factual, legal, and policy grounds therefor.

2. Give parties or their counsel the option, at a convenient time and place, to present to the agency or hearing officer written or oral evidence in opposition to the action of the agency or to its refusal to act, or a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction.

3. If the objections of the parties are overruled, provide a written explanation within 7 days.

(b) The record shall only consist of:

1. The notice and summary of grounds.

2. Evidence received.

3. All written statements submitted.

4. Any decision overruling objections.

5. All matters placed on the record after an ex parte communication.

6. The official transcript.

7. Any decision, opinion, order, or report by the presiding officer.

(3) ADDITIONAL PROCEDURES APPLICABLE TO PROTESTS TO CONTRACT SOLICITATION OR AWARD.-- Agencies subject to this chapter shall use the uniform rules of procedure, which provide procedures for the resolution of protests arising from the contract solicitation or award process. Such rules shall at least provide that:

(a) The agency shall provide notice of a decision or intended decision concerning a solicitation, contract award, or exceptional purchase by electronic posting. This notice shall contain the following statement: "Failure to file a protest within the time prescribed in section 120.57(3), Florida Statutes, shall constitute a waiver of proceedings under chapter 120, Florida Statutes."

(b) Any person who is adversely affected by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the notice of decision or intended decision. With respect to a protest of the terms, conditions, and specifications contained in a solicitation, including any provisions governing the methods for ranking bids, proposals, or replies, awarding contracts, reserving rights of further negotiation, or modifying or amending any contract, the notice of protest shall be filed in writing within 72 hours after the posting of the solicitation. The formal written protest shall be filed within 10 days after the date the notice of protest is filed. Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter. The formal written protest shall state with particularity the facts and law upon which the protest is based. Saturdays, Sundays, and state holidays shall be excluded in the computation of the 72-hour time periods provided by this paragraph.

(c) Upon receipt of the formal written protest that has been timely filed, the agency shall stop the solicitation or contract award process until the subject of the protest is resolved by final agency action, unless the agency head sets forth in writing particular facts and circumstances which require the continuance of the solicitation or contract award process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare.

(d)1. The agency shall provide an opportunity to resolve the protest by mutual agreement between the parties within 7

days, excluding Saturdays, Sundays, and state holidays, after receipt of a formal written protest.

2. If the subject of a protest is not resolved by mutual agreement within 7 days, excluding Saturdays, Sundays, and state holidays, after receipt of the formal written protest, and if there is no disputed issue of material fact, an informal proceeding shall be conducted pursuant to subsection (2) and applicable agency rules before a person whose qualifications have been prescribed by rules of the agency.

3. If the subject of a protest is not resolved by mutual agreement within 7 days, excluding Saturdays, Sundays, and state holidays, after receipt of the formal written protest, and if there is a disputed issue of material fact, the agency shall refer the protest to the division for proceedings under subsection (1).

(e) Upon receipt of a formal written protest referred pursuant to this subsection, the director of the division shall expedite the hearing and assign an administrative law judge who shall commence a hearing within 30 days after the receipt of the formal written protest by the division and enter a recommended order within 30 days after the hearing or within 30 days after receipt of the hearing transcript by the administrative law judge, whichever is later. Each party shall be allowed 10 days in which to submit written exceptions to the recommended order. A final order shall be entered by the agency within 30 days of the entry of a recommended order. The provisions of this paragraph may be waived upon stipulation by all parties.

(f) In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered. In a protest to an invitation to negotiate procurement, no submissions made after the agency announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply shall be considered. Unless otherwise provided by statute, the burden of proof shall rest with the party

protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

(g) For purposes of this subsection, the definitions in s. 287.012 apply.

(4) INFORMAL DISPOSITION.--Unless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order.

(5) APPLICABILITY.--This section does not apply to agency investigations preliminary to agency action.

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**§ 120.68, Florida Statutes**

120.68 Judicial review.--

(1) A party who is adversely affected by final agency action is entitled to judicial review. A preliminary, procedural, or intermediate order of the agency or of an administrative law judge of the Division of Administrative Hearings is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(2)(a) Judicial review shall be sought in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law. All proceedings shall be instituted by filing a notice of appeal or petition for review in accordance with the Florida Rules of Appellate Procedure within 30 days after the rendition of the order being appealed. If the appeal is of an order rendered in a proceeding initiated under s. 120.56, the agency whose rule is being challenged shall transmit a copy of the notice of appeal to the committee.

(b) When proceedings under this chapter are consolidated for final hearing and the parties to the consolidated proceeding seek review of final or interlocutory orders in more than one district court of appeal, the courts of appeal are authorized to transfer and consolidate the review proceedings. The court may transfer such appellate proceedings on its own motion, upon motion of a party to one of the appellate proceedings, or by stipulation of the parties to the appellate proceedings. In determining whether to transfer a proceeding, the court may consider such factors as the interrelationship of the parties and the proceedings, the desirability of avoiding inconsistent results in related matters, judicial economy, and the burden on the parties of reproducing the record for use in multiple appellate courts.

(3) The filing of the petition does not itself stay enforcement of the agency decision, but if the agency decision has the effect of suspending or revoking a license, supersedeas shall be granted as a matter of right upon such conditions as are reasonable, unless the court, upon petition of the agency, determines that a supersedeas would constitute a probable danger to the health, safety, or welfare of the state. The agency also may grant a stay upon appropriate terms, but, whether or not the action has the effect of suspending or revoking a license, a petition to the agency for a stay is not a prerequisite to a petition to the court for supersedeas. In any event the court shall specify the conditions, if any, upon which the stay or supersedeas is granted.

(4) Judicial review of any agency action shall be confined to the record transmitted and any additions made thereto in accordance with paragraph (7)(a).

(5) The record for judicial review shall be compiled in accordance with the Florida Rules of Appellate Procedure.

(6)(a) The reviewing court's decision may be mandatory, prohibitory, or declaratory in form, and it shall provide whatever relief is appropriate irrespective of the original form of the petition. The court may:

1. Order agency action required by law; order agency exercise of discretion when required by law; set aside agency action; remand the case for further agency proceedings; or decide the rights, privileges, obligations, requirements, or procedures at issue between the parties; and

2. Order such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld.

(b) If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as the court finds necessary to preserve the interests of any party and the public pending further proceedings or agency action.

(7) The court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that:

(a) There has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts;

(b) The agency's action depends on any finding of fact that is not supported by competent, substantial evidence in the

record of a hearing conducted pursuant to ss. 120.569 and 120.57; however, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact;

(c) The fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure;

(d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action; or

(e) The agency's exercise of discretion was:

1. Outside the range of discretion delegated to the agency by law;

2. Inconsistent with agency rule;

3. Inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; or

4. Otherwise in violation of a constitutional or statutory provision;

but the court shall not substitute its judgment for that of the agency on an issue of discretion.

(8) Unless the court finds a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

(9) No petition challenging an agency rule as an invalid exercise of delegated legislative authority shall be instituted

pursuant to this section, except to review an order entered pursuant to a proceeding under s. 120.56, unless the sole issue presented by the petition is the constitutionality of a rule and there are no disputed issues of fact.

(10) If an administrative law judge's final order depends on any fact found by the administrative law judge, the court shall not substitute its judgment for that of the administrative law judge as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside the final order of the administrative law judge or remand the case to the administrative law judge, if it finds that the final order depends on any finding of fact that is not supported by competent substantial evidence in the record of the proceeding.

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**Florida Administrative Code 62D-2.014**

**62D-2.014 Activities and Recreation.**

(1) Regulation of Recreation Activities. The Division, in furtherance of the policy and intent of Chapter 258, Florida Statutes, may prohibit or regulate any activity that lessens the safety or recreational experience of the visiting public or lessens the natural or cultural value of the park. Except as provided herein, all recreational activities will occur at such locations as designated for specific uses by the Division.

(2) Park Entrance Rules and User Fees.

(a) Entering State Park Property. Entering or leaving any state park property except through the designated entrance points (except in emergency cases) is prohibited. No person may enter a state park property for the purpose of using the resources or facilities therein without paying the appropriate fee, if any, in effect at the time for that park property. A full stop shall be made at the Ranger Station when entering a state park.

(b) Fees. Admission fees shall be waived by authorized Division personnel for representatives of any government agency and for salesmen, tradesmen or other individuals

who will benefit the park or state park system and who present proper identification.

Admission fees shall also be waived for:

1. Children under six years of age;

2. Patients of Florida State Mental Institutions and clients of the Department of Juvenile Justice and the Department of Children and Family Services, and other similar institutions which are fully funded by federal, state, or local government, when such patients and/or clients are part of an organized group or program under the sponsorship and supervision of their respective institutions or parent agencies;

3. Florida school groups, including vocational schools, colleges and universities, accompanied by one or more teachers, and bearing a letter from the school principal, professor or other appropriate official, certifying that the park visit is related to a specific school curriculum and is for educational purposes rather than a purely recreational outing;

4. Division employees and their families;

5. The Division also offers a fifty percent discount on base camping fees to Florida citizens who are at least 65 years of age or Florida citizens possessing a current Social Security disability award certificate or proof of a 100% disability award from the Federal government or other acceptable proof of 100% disability.

(c) The Division Director shall recommend standard admission and other park fees, taking into consideration the following factors:

1. User demand;

2. Location of the park, including distance from major metropolitan areas;

3. Cost of managing and operating the park;

4. Type of facilities available;

5. Season; and

6. Natural and historic resource values of the park.

(d) User fees shall become effective after they are advertised in a general statewide news release, and, if requested, reviewed at a public hearing, and approved in writing by the

Secretary of the Department. Copies of the current fee schedule may be obtained from State Park offices or by writing to the Division at MS 500, 3900 Commonwealth Boulevard, Tallahassee, Florida 32399-3000.

(3) Traffic Control. Authorized law enforcement officers and park personnel shall direct traffic in parks and on roads adjacent thereto as conditions warrant. All persons shall comply with lawful orders, signals, and direction of such officers and personnel. All persons shall observe and comply with posted traffic control devices and signs.

(4) Speed of Vehicles in Parks. No person shall drive a vehicle at a speed greater than is reasonable or prudent, having due regard for the surface, width and condition of paving and the traffic thereon, particularly when near children or bicyclists. Speed shall not exceed 25 miles per hour, and at the more congested centers and near park buildings, beaches, campgrounds, and picnic and play areas, it shall not exceed 15 miles per hour or as otherwise posted.

(5) Restriction to Roads. No person shall drive any vehicle on any area except designated roads, parking areas, or other such designated areas.

(6) Parking. All vehicles shall be parked only in established parking areas or in such other areas and at such times as the Division may designate.

(7) Bathing and Swimming.

(a) No individual shall swim, bathe, or wade in any waters at such places designated as prohibited for such activity by the Division. All such activities shall be in compliance with this chapter.

(b) In every area of a park including bathing areas no individual shall expose the human, male or female genitals, pubic area, the entire buttocks or female breast below the top of the nipple, with less than a fully opaque covering.

(8) Boating.

(a) No person shall operate watercraft regardless of means of propulsion upon any park watercourse, bay, lagoon, lake, canal, pond, slough, or those sovereign submerged lands lying within 400 feet of the Mean High Water or Ordinary High Water Line within the riparian lines of any state park

unit in places designated by the Division as closed for such purposes.

(b) No watercraft shall be launched into or removed from any park waters, except at places designated for such purpose by the Division.

(c) No person shall moor, anchor or tie up to any buoy, marker, bank or any wharf, dock, tree, building or other object or structure on the bank, any watercraft of any kind in waters within or contiguous to park areas within one hundred feet of the shoreline, in areas designated by the Division as closed for such purposes. This restriction does not apply to vessels of a law enforcement agency of a local, state, or federal government.

(d) No person other than a Division employee or a concessionaire of the Division shall rent or hire, for profit or charge, any kind of watercraft in any park waters. Nor shall any watercraft operating for hire or carrying passengers for a fee, or contemplating such, land or receive such passengers at any dock, wharf or anchorage within jurisdiction of the Division except by permit. Permits shall be issued only when no concession agreement exists or when the concessionaire does not wish to provide the services requested. Permits shall be issued when it is determined by the Division that the request to provide this service would not adversely affect park resources, would be consistent with park management practices as stated in ss. 258.004, 258.007, 258.017 and 258.037, Florida Statutes, and would provide a needed visitor service. Permits shall be applied for in the same manner as in subsection 62D-2.013(7), herein.

(e) No person operating passenger launches or excursion boats from outside the parks that are for rent or hire or carrying passengers for money shall land or anchor or tie up in any park without first having applied for and received a permit from the Division. Permits shall be issued when it is determined by the Division that the request to provide this service would not adversely affect park resources, would be consistent with park management practices as stated in ss. 258.004, 258.007, 258.017 and 258.037, Florida Statutes, and would provide a needed visitor service. Permits shall be applied for in the same manner as in subsection 62D-2.013(7),

herein. All persons operating such watercraft shall be subject to all Division boating rules.

(9) Fishing.

(a) Fishing is allowed in park waters, by any legal method, except where prohibited by the Division and under the provisions of this chapter. Any device which is employed to remove, capture, or attempt to capture fish in any waters closed to fishing or any device otherwise used in violation of this chapter shall be seized and confiscated by law enforcement officers.

(b) Under the provisions of this chapter commercial fishing for food and bait fish is allowed in the John Pennekamp Coral Reef State Park, St. Lucie Inlet State Park and those sovereign submerged lands lying within 400 feet of the Mean High Water or Ordinary High Water Line within the riparian lines of any state park unit under Division jurisdiction, except as prohibited in Rule 62D-2.014(1).

(c) All fishing in John Pennekamp Coral Reef State Park is subject to Florida Fish and Wildlife Conservation Commission Rule 68B-5.002, Florida Administrative Code, and provisions of Rule 62D-2.

(d) Spearfishing is prohibited in all state parks.

(10) Hunting and Firearms. Hunting, trapping or the pursuit of wildlife is prohibited on all park property, except in Reserves, as authorized by the Florida Fish and Wildlife Conservation Commission. No person shall use, carry, or possess in any park weapons such as firearms of any type, air rifles, spring guns, bows and arrows, gigs (except in areas where gigs may be legally used for saltwater fishing), sling shots, or any other forms of weapons or trapping devices potentially dangerous to wildlife or human safety except when such weapons or traps are used for resource management purposes as authorized in this subsection. Shooting into park areas from beyond park boundaries is prohibited. Any device which is employed to kill, immobilize, or capture any wildlife or any device otherwise used in violation of this chapter shall be seized and confiscated by law enforcement officers. The Division may authorize the control of nuisance animals and may remove all exotic animals from parks by trapping and other

necessary means for park resource management purposes. Such authorization shall be in the form of a license, permit, or contract negotiated by the parties or made pursuant to an advertised bid by the Division. Authorization may be obtained in the same manner as stated in 62D-2.013(7), herein.

(11) Subleases of Certain Properties. The Division may sublease certain properties, or portions thereof, to other state, county or local governmental agencies for management purposes subject to approval by the Board of Trustees of the Internal Improvement Trust Fund in accordance with ss. 253.034(4), Florida Statutes. The terms and conditions of the sublease shall control the use and management of the property.

(12) Alcoholic Beverages. Possession and consumption of alcoholic beverages within any park during established operating hours are prohibited except in those facilities such as restaurants and lodges.

(13) Domestic Animals.

(a) Domestic animals shall be regulated in parks at any time when appropriate to enhance the recreational experience of other visitors or to protect the parks' resources.

(b) Domestic breeds of dogs, cats and other fur-bearing pets, except dog guides, services dogs and nonhuman primates of the genus *cebus*, which are trained and registered for assisting the physically impaired, shall be excluded from the following places in a park: food-service areas, designated camping areas, cabins, bathing and swimming areas including land and water portions, park buildings, playgrounds, and other designated areas. Pets are permitted in all other areas subject to the following restrictions:

1. All pets must be confined, leashed, or otherwise under the physical control of a person at all times. Leashes may not exceed six feet in length. This rule does not apply to horses and pack animals brought in for equestrian trail use.

2. Pets must be well behaved at all times. Pets must be confined in the owner's camping unit during designated quiet hours. Unconfined pets may not be left unattended for more than 30 minutes and must be leashed.

3 Pet owners shall pick up after their pets and properly dispose of all pet droppings in trash receptacles.

4. Pets which are noisy, vicious, dangerous, disturbing or intimidating to other persons, and pets which damage park resources are considered to be nuisances and will not be permitted to remain in the park.

5. Owners of dogs and cats and other pets, required by Florida Law to be vaccinated against rabies, must provide proof of rabies vaccination when registering to camp.

(c) Camping areas and other park areas will be evaluated, as to the suitability of pets, on a periodic basis as part of the unit management planning process. Areas of the park designated as prohibited for pets shall be determined based on park natural and cultural resources, primary recreational activities, camper and pet health and safety, geographical location and layout of camping areas, and the ability to provide a quality recreational experience for all visitors. A fee will be charged for each pet accompanying a camping party.

(14) Merchandising. No person shall offer for sale any article or material, nor place any stand, cart, or vehicle for the transportation, sale or display of any article or material for sale within any state park unless authorized by the Division. Authorization shall be issued when park resources are not adversely affected, existing contractual relationships are not impaired, a needed visitor service is provided, and the activity would be consistent with park management practices as stated in ss. 258.004, 258.007, 258.017 and 258.037, Florida Statutes. Authorizations may be obtained in the same manner as stated in 62D-2.013(7), herein.

(15) Aircraft. No person operating or responsible for any aircraft, glider, balloon, parachute, or other aerial apparatus shall cause any such apparatus to take off from or land in any park except in an emergency when human life is endangered or where a designated landing facility may exist on park property.

(16) Hours.

(a) The opening and closing hours for each park shall be posted. No person shall remain in any park after closing unless properly registered as an overnight visitor or in

possession of a valid after hours permit from the Division or park manager. Said permits may be obtained from the park office where such after hours use is offered.

(b) The Division, in furtherance of the park management practices as stated in ss. 258.004, 258.007, 258.017 and 258.037, Florida Statutes, may close any park or section thereof to the public at any time and for any interval of time, either temporarily or at regular stated intervals and either entirely or only for certain uses. Park closures will be used to provide visitor and employee safety, resource protection, operational efficiency, and facility maintenance. No person shall remain in any closed park or section

thereof, unless authorized by the Division or park manager, or their delegee. Verbal authorization shall be granted by the Division, the park manager, or their delegee, when it is in the best interest of the park, or of the person remaining in the closed area, for safety, protection, construction, or restoration purposes.

(17) Photography. All commercial photography, motion pictures, and other media production activities are prohibited without a permit from the Division. All private photography involving special settings or structures (such as use of exotic animals or attachments to park lands) which adversely impacts park resources or public recreational activities is prohibited without authorization by the Division. Permits for these activities shall be issued if the activity is consistent with park management practices as stated in ss. 258.004, 258.007, 258.017 and 258.037, Florida Statutes, and the activity would not disrupt normal park operation, adversely impact the park's resources, or disrupt the public's normal enjoyment of the park. Permits may be obtained at the park for which the permit is desired and after approval by the park manager of requested photographic arrangements and receipt of published fees. A state parks fee schedule may be obtained by writing to the Division of Recreation and Parks, MS 500, 3900 Commonwealth Boulevard, Tallahassee, Florida 32399-3000. All activity under the permit is subject to the terms and conditions listed on the permit and to the provisions of Rule 62D-2. The time and exact location within a park for photography shall be

mutually satisfactory to the park manager and the permittee. All other private photography is encouraged. Commercial photography productions and related activities which would disrupt normal park operations, adversely impact the park's resources, or disrupt the public's normal enjoyment of the park shall require a contract. The terms of the contract shall be negotiated with the Division and must result in a net positive benefit to the park. This subsection is not intended to, and shall not, impair any constitutional right of free speech.

(18) Free Speech Activities. Free speech activities include, but are not limited to, public speaking, performances, distribution of printed material, displays, and signs. Free speech activities do not include activities for commercial purposes. Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. Free speech activities shall not create a safety hazard or interfere with any other park visitor's enjoyment of the park's natural or cultural experience. The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity.

*Specific Authority 253.034(4) FS. Law Implemented 258.004, 258.007(1),(2),(3) 258.014, 258.016, 258.017, 258.037 FS. History–New 4-16-96,*

*Amended 4-14-98, 12-19-99.*

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Department of Environmental Protection
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Mail Station 35
Telephone: 850-488-9314
Facsimile: 850-414-1228

November 28, 2000

BY FACSIMILE ONLY

Mr. Marv Frandsen
4467 Country Rd.
Melbourne, FL 32934

Dear Mr. Frandsen:

Perry J. Smith, Manager of Honeymoon Island State Park has asked me to respond to your request to coordinate time, place and manner restrictions regarding your free speech activities at the park on December 2, 2000. There are three such restrictions which are applicable to all of your proposed activities. First, whenever free speech activities are held in a state park, the manager must always consider public safety issues, park operations, and the use and enjoyment by other visitors. In light of these concerns the park staff are unable to accommodate a 7 hour demonstration as this would create a unreasonable burden on park personnel and would impede use of the park by other visitors. Therefore, the times on that date in which your demonstration can be accommodated by the park are either 9:00 AM to 11:00 AM or 2:00 PM to 4:00 PM.

The second such restriction is related to the place of your planned activities, especially the parade you refer to in paragraph (b). Due to the concerns and responsibilities of park staff stated in the paragraph above, each of your activities will be limited to an appropriate area of the park. Please consult with Manager Smith to determine which area will be most suitable on December 2nd.

The third such restriction is related to the manner in which your activities are to be conducted. At all times any activity in the Park must be held in accordance with F.A.C. Rule 62D-2.014(7)(b), which states that "no individual shall

expose the human, male or female genitals, pubic area, the entire buttocks or female breasts below the top of the nipple, with less than a fully opaque covering." Please ensure that no nudity is involved in any stage of your activities. Violation of any park rule constitutes a second degree misdemeanor under s. 258.007(2), Florida Statutes, and enforcement of such rules can include arrest of the violator(s).



The fourth and final restriction is also related to the manner. No sound amplification may be used in the state park due to its tendency to interfere with the other visitors' enjoyment of the natural surroundings, which is what Florida State Parks are all about. See s. 62D-2.014(18), F.A.C. Copies of all cited rules and statutes are included for your reference.

If you have any further questions or concerns feel free to contact me or Suzanne Brantley at the above address or phone number.

Sincerely,
(/s/ for) Mara B. Levy
Assistant General Counsel
MBL/sbw
Enclosure(s)
cc: Perry J. Smith
Michael Murphy
John Baust

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

| | |
|---|---|
| MARVIN VAUN FRANDSEN, | ) |
| | ) |
| Petitioner, | ) |
| | ) |
| vs. | ) Case No. 01-0527RX |
| | ) |
| DEPARTMENT OF ENVIRONMENTAL PROTECTION, | ) |
| | ) |
| Respondent. | ) |

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Charles A. Stampelos, held a final hearing in the above-styled case on May 30 and 31, 2001, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Marvin Vaun Frandsen, pro se
4467 County Road
Melbourne, Florida 32934

For Respondent: Suzanne B. Brantley, Esquire
Mara B. Tickett, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

At issue in this proceeding is whether the Department of Environmental Protection (Department), Division of Recreation and Parks' (Division) existing Rule

62D-2.014(18), Florida Administrative Code (Rule), is an invalid exercise of delegated legislative authority. Specifically, the issues are whether the Division has exceeded its grant of rulemaking authority and whether the Rule is vague, fails to establish standards for Division decisions, and vests unbridled discretion in the Division.

## PRELIMINARY STATEMENT

On February 5, 2001, Petitioner, Marvin Vaun Frandsen (Frandsen) filed a "Petition to Declare State Park "Free Speech" Rule Invalid." Frandsen alleged that Rule 62D-2.014(18) is an invalid exercise of delegated authority, that certain agency statements are rules and violate Section 120.54(1)(a), Florida Statutes (2000), that the Division's application of the Rule "to restrict, limit or forbid free speech activities in state parks" is invalid, and that the Rule is an unconstitutional prior restraint. (All citations to the Florida Statutes are to the 2000 version unless otherwise indicated.)

On May 22, 2001, the Department filed a Motion in Limine, and in essence, requested an order limiting Frandsen from introducing evidence regarding any "as applied" challenge to the validity of the Rule which appeared in his Petition and further to limit Frandsen's evidence regarding particular restrictions placed on Frandsen and others and activities in state parks involving nudity and the restrictions placed on nudity and the



Division's policy on nudity. In part, the Department suggested that Frandsen must file a separate petition, and necessarily with the Department, pursuant to Sections 120.569 and 120.57, Florida Statutes, in order to challenge the validity of specific agency statements (which may include agency action related to Frandsen) which may have been applied to him and which may have affected his substantial interests.

Frandsen filed a Response and also filed a Petition in Case No. 01-2067RU, challenging the legality of various agency statements "on their face and as applied" to him. The

latter Petition was filed in response to the Department's Motion. The second Petition incorporated some of what was alleged in this rule challenge, with additional allegations pertaining to his "as applied" challenge. However, the second Petition was filed with the Division of Administrative Hearings in the context of a non-rule policy challenge, notwithstanding reference to Sections 120.569 and 120.57, Florida Statutes. The Petition was not filed with the Department. See Hasper v. Department of Administration, 459 So. 2d 383 (Fla. 1st DCA 1984).

The parties discussed their respective positions during a telephone hearing on May 25, 2001, and Frandsen orally withdrew his Petition filed in Case No. 01-2067RU and the Division of Administrative Hearing's file was closed.



The Motion in Limine was otherwise denied without prejudice. See Order, May 29, 2001.

Consistent with Frandsen's withdrawal of his Petition in Case No. 01-2067RU, on May 29, 2001, Frandsen filed a "Motion to Amend Petition to Narrow Scope of Claims," to exclude his challenge to agency statements as rules pursuant to Section 120.54(4)(a), Florida Statutes. The Department did not object. The Motion was granted and Frandsen's challenge to the agency statements as rules referenced in his Petition were excluded. See Order, May 29, 2001.

At hearing, Frandsen called eight witnesses: himself; Toni Anne Wyner; John C. Palm; Perry J. Smith, Park Manager IV of the Division of Recreation and Parks, Department of Environmental Protection; Michael K. Murphy, District 4 Bureau Chief of the Division of Recreation and Parks, Department of Environmental Protection; John Baust, Bureau Chief of Operational Services of the Division of Recreation and Parks, Department of Environmental Protection; Fran Mainella, Director of the Division of Recreation and Parks, Department of Environmental Protection; and Eric Miller, Bureau Chief of Park Patrol of the Division of Law Enforcement, Department of Environmental Protection. The Department called Perry J. Smith, Michael K. Murphy, John Baust, Fran Mainella, and Eric Miller.

Frandsen offered 63 exhibits, all of which were admitted. The Department's Exhibits 1 through 4 were also admitted into evidence.

The Transcript was filed June 28, 2001. The parties stipulated to extend the time to file proposed final orders until August 27, 2001. Frandsen filed a Closing Argument and a Memorandum of Law, and each party filed a proposed final order which have been considered in the preparation of this Final Order. Frandsen also filed a Motion for Reimbursement of Costs should he prevail, which is denied based upon the disposition of this proceeding.

## FINDINGS OF FACT

### Frandsen

1. Frandsen is a citizen of the state of Florida who is interested in free speech activities in state parks that advance the cause of naturist activities, including recreation. Frandsen is a physicist and works for the United States Air Force, essentially as a defense scientist.

2. Frandsen's original challenge in this proceeding was directed, in part, to the Division's application of the Rule and the validity of agency statements as rules and as applied to him. Frandsen has deleted these from his challenge. This Final Order does not decide whether the Division has properly applied the Rule to Frandsen nor whether any agency statements are



invalid, nor whether the Rule is constitutionally infirm either on its face or as applied.

3. Frandsen's cause, with respect to the state park system, is to see limited, designated areas within state parks open to "clothing optional recreation, particularly beachfront recreation, where someone can sunbathe," "socialize," and "swim nude in the ocean and on the beaches as the human race has for eternity."

4. Frandsen is aware of the anti-nudity rule, Rule 62D- 2.014(7)(b), but is challenging the right to be able to advocate changing the rule which prohibits nudity. For Frandsen, "[t]he issue [here] is [his] ability to exercise free speech to communicate with the public to advocate for [his] cause," in a state park. Conversely, "[t]his action does not deal with the issue of whether [Frandsen has] a constitutional right to incorporate nudity into a communication." His main concern is the absence of standards in Rule 62D-2.014(18) to channel the Division's exercise of discretion relating to time, place, and manner restrictions placed on free speech activities and also the threat of arrest if the restrictions are not complied with.

5. The Department stipulated that Frandsen has standing to challenge Rule 62D-2.014(18) as an invalid exercise of delegated legislative authority.

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Department and Division

6. The Department is an agency of the state of Florida, which manages and operates state parks under its jurisdiction, pursuant to Chapter 258, Part I, Florida Statutes, through its Division of Recreation and Parks.

7. The Division has the duty "to supervise, administer, regulate, and control the operation of all public parks . . .." Section 258.004(1), Florida Statutes. Additionally, the Division "shall preserve, manage, regulate, and protect all parks and recreational areas held by the state . . .." Section 258.004(2), Florida Statutes.

8. It is the policy of the Division "[t]o promote the state park system for the use, enjoyment, and benefit of the people of Florida and visitors . . . administer the development, use and maintenance of these lands and render such public service in so doing, in such a manner as to enable the people of Florida and visitors to enjoy these values without depleting them . . .." Section 258.037, Florida Statutes.

9. "The division has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement provisions of law

conferring duties on it, and the violation of any rule authorized by this section shall be a misdemeanor and punishable accordingly." Section 258.007(2), Florida Statutes.

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State Parks

10. The Division manages 155 state parks, which comprise over a half a million acres. The term "state parks" is generic and includes historic sites, beach areas, river parks, parks with swimming pools, geological sites, archeological sites, and recreation areas. The parks are very diverse and offer different opportunities for visitors. The parks can range in size from just a few acres to over 25,000 acres.

11. Florida's state park system is the fourth largest in the nation. Over 16 million people visited the parks last year, which was an increase of 13 1/2 percent from the previous year.

12. The state park system is divided into five districts, each of which includes 20 to 30 parks. The Division employs over 1,000 full-time employees and approximately 300 to 500 part-time, OPS help.

13. Each district is under the supervision of a district bureau chief who is responsible for that district's employees, visitors, volunteers, and parks.

14. Individual parks or groups of parks are under the direct supervision of a park manager. Honeymoon Island State Park, which is located on the west coast of Florida in Pinellas County, is one of six main parks all managed by the same park manager. It is part of a GEO (Geographically Efficient

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Operation) park, which includes 15 properties, both submerged lands and uplands, and extends through 3 counties.

15. Not every park is staffed with Division personnel at all times. For example, District 4 has approximately 25 parks with 17 park managers. In parks which are not staffed, the telephone numbers of the park manager and assistant

manager are posted within the park at various locations including near the restrooms, pay phones, concessions, or camp grounds.

16. Various activities are enjoyed in state parks including: swimming, camping, hiking, boating, biking, horseback riding, wildlife viewing, snorkeling, guided tours, and picnicking. Each park offers a different number and combination of these activities. The Division's primary mission is to enable the public to enjoy outdoor-based resource recreation.

17. Through its rules, the Division regulates many activities in state parks to ensure the safety of visitors and to protect park resources, including the speed of vehicles, parking, boating, fishing, the consumption of alcoholic beverages, bathing and swimming, domestic animals, hunting, merchandising, aircraft, and commercial photography. See Rule 62D-2.014(4), (6), (7), (8), (9), (10), (12), (13), (14), (15), and (17), Florida Administrative Code.



The Rule

18. Rule 62D-2.014(18), Florida Administrative Code, provides:

> Free Speech Activities. Free speech activities include, but are not limited to, public speaking, performances, distribution of printed material, displays, and signs. Free speech activities do not include activities for commercial purposes. Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. Free speech activities shall not create a safety hazard or interfere with any other park visitor's enjoyment of the park's natural or cultural experience. The park

manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity.

19. Rule 62D-2.014 pertains to "activities and recreation." Section 258.007(2), Florida Statutes, is cited as the specific authority for Rule 62D-2.014, including Subsection (18). Rule 62D-2.014, including Subsection (18), implements Sections 258.004, 258.007(1)-(3), 258.014, 258.016, 258.017, and 258.037, Florida Statutes.

20. The Rule was adopted in 1996 to inform the public that free speech activities are welcome in state parks. It sets broad guidelines and standards for park managers to ensure that the public's First Amendment rights are respected and not infringed. The Division felt the need for a rule "to put park



staff on notice that [First Amendment activity] is okay and it is allowable and it is acceptable." No permits have been issued for free speech activities since the mid-1990's as a result of a federal court order. See The Naturist Society, Inc. v. Fillyaw, 858 F. Supp. 1559 (S.D. 1994).

21. The Rule was not intended to be all encompassing because of the diversity of the parks. Most activities in the parks include some form of free speech activity. The term "include, but are not limited to" means anything that is covered by the First Amendment, whether it be oral, written, or symbolic conduct. The Rule applies to even a single individual wishing to engage in free speech activities as defined by the Rule, including, but not limited to the activity of "displays" and "signs."

22. The Rule states that free speech activities shall not interfere with any other park visitor's enjoyment of the park's natural or cultural experience. This means that people are free to conduct any activity they choose so long as the manner in

which they do it does not infringe on other park visitors' purpose for coming to the park. For example, if an area of a particular park were known for bird watching, it would be inappropriate for someone to walk through that area playing loud music or shouting. The Rule contemplates that the Division will be diligent in protecting visitor enjoyment and safety.

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23. The Rule states that free speech activities shall not create a "safety hazard." Safety hazards vary depending on the activity, area, and park involved. They can range from the dangers inherent to a large assembly of people, which would be the same in any park, to the dangers of holding a particular activity in a specific area of a specific park. The types of safety hazards a manager must consider will vary significantly with the type of activity and the park in which it takes place.

24. Park managers also consider "visitor use patterns" when determining the suitability of the time, place, and manner of a particular activity. Visitor use patterns are the different activities, which typically occur in a particular park. They vary by time of the day and the season and are therefore different day-by-day and park-by-park. For example, a visitor may tour the Gamble Plantation as a historic site, but not swim. At Honeymoon Park, people use the beach and swim. Moreover, during the summer, the use patterns at Wakulla Springs State Park for swimming are heavy, whereas the pattern for swimming decreases rapidly during the winter. Different safety concerns arise given the nature and use(s) of each park.

25. A person or group wishing to engage in free speech activities are not always able to access a park manager to determine applicable time, place, and manner restrictions

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because the park manager may not be on duty during all hours and days when the park is open.

26. The Division does not decide in advance and

publicly post or otherwise publicly provide generic time, place, and manner restrictions.

27. Beyond the Rule, there are no written documents, handbooks, guidelines, and policies of general application to provide guidance to the Division park managers to determine what time, place, and manner restrictions may be applied.

28. Each determination of time, place, and manner restrictions by the Division, including the resources, which may be needed to be expended to accommodate a free speech activity, is made on a case-by-case basis based upon the criteria in theRule.

29. Because of the number of parks, their diversity, staffing issues, and the varying attendance on particular days or in particular seasons, it would be impracticable to develop a set of standard time, place, and manner restrictions for every possible activity, which may occur in every park.

30. The Rule contemplates that a park manager may consult with other personnel with the Department and the Division regarding the application of the Rule. Park managers have consulted with legal counsel prior to responding to a request or, in some cases, request legal counsel to respond directly to



the requesting person. This procedure is the norm regarding requests for "clothing optional demonstration[s]." The Department's "Office of General Counsel is consulted on all nudity issues that may involve free speech to ensure compliance with all current laws" and responses are given on a case-by-case basis in light of counsel's interpretation of the Rule, reached in conjunction with First Amendment case law.

31. The Rule does not require contact with a park manager prior to engaging in a free speech activity.

32. The Rule contemplates that the public may contact a park manager to ensure that a planned activity will not create a safety hazard or conflict with other planned activities. For example, weddings are welcomed in the state

parks, although prior notification is not required. But, notification can be helpful to the park manager to determine the number of people involved and the time of day to ensure, for example, that parking is available.

33. Although the Rule does not state a time in which park managers must respond to a request for any applicable time, place, and manner restrictions, the Rule contemplates that these decisions will be made within a reasonable time. The Division expects their park managers to respond in an expeditious manner. The Division's typical practice is to respond within a 2 or 3 week period. There have been exceptions to this expectation.



The level of complexity of the inquiry may lengthen the time to respond.

34. Generally, any person dissatisfied with a response from the park manager may contact various levels of responsibility throughout the Division and Department. This process is not referred to as "an official administrative appeal." Nevertheless, any decision regarding an interpretation of a park rule or a response to an inquiry results in the formulation of agency action. Any person substantially affected by the agency action should be given a point of entry to challenge the agency action pursuant to and consistent with the procedural requirements of the APA. See Department's Proposed Final Order, page 10, paragraph 46.

## CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. Section 120.56, Florida Statutes.

36. Frandsen alleges that Rule 62D-2.014(18), is an invalid exercise of legislative authority because (1) the Division has exceeded its grant of rulemaking authority under Section 120.52(8)(b), Florida Statutes, and (2) the Rule is vague, fails to establish adequate standards for Division decisions, and vests unbridled discretion in the Division under

Section 120.52(8)(d), Florida Statues.



37. Frandsen has the burden of proving the invalidity of the Rule 62D-2.014(18). St. Johns River Water Management District v. Consolidated-Tomoka Land Co., 717 So. 2d 72, 76-77 (Fla. 1st DCA 1998)(Tomoka).

> The standards for determining whether an existing Rule implements or interprets a specific statutory power and duty.

38. Material here, an "invalid exercise of delegated legislative authority" is:

> [an] action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.; or
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency.
> Section 120.52(8)(b)(d), Florida Statutes.

39. The "flush left," language of Section 120.52(8), Florida Statutes, provides the following standards in the closing paragraph:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have the authority to adopt a rule only because

> it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers or duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

40. This language "provides general standards to be used in determining the validity of a rule in all cases." Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 597 (Fla. 1st DCA 2000) (Save of the Manatee). This language also appears verbatim in Section 120.536(1), Florida Statutes.

41. Some digression in the legal discussion pertinent to this case is necessary in order to place the "flush left" language in context, which has been recently explained by Judge Padovano, writing for the court, in Save the Manatee, in light of 1999 amendments to the "flush left" language.

42. "In 1996, the Legislature significantly revised the Administrative Procedure Act (APA), Chapter 120, Florida Statutes, to clarify definitions and exceptions and to simplify its procedures. Notable among the 1996 amendments to the APA are amendments creating a statutory standard for rulemaking



(s.120.536(1), F.S.) and inclusion of this standard [the flush left language] in the definition of an invalid exercise of

delegated legislative authority (s.120.52(8), F.S.)." See House of Representatives as Further Revised by the Committee on Governmental Rules and Regulations Final Analysis, CS/HB 107 (Chapter 99-379, Laws of Florida), June 30, 1999, Storage Name: h0107z.grr, page 2.

43. The 1996 amendments included, in material part, the "flush left" language, and provided that, "[a]n agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute." Section 120.52(8), Florida Statutes (Supp. 1996). See also Save of Manatee, 773 So. 2d at 598. This standard was discussed in several cases, including Tomoka.

44. In Tomoka, land owners challenged proposed rules of the water management district that would have added two hydrologic basins to five others within the district and would have imposed four new development standards within these basins. Administrative Law Judge Donald R. Alexander found the proposed rules to be supported by competent substantial evidence, but concluded that the statutory authority on which they were based was ". . . merely a general, nonspecific description of the agency's duties." Judge Alexander determined that the enabling statute must "detail" the powers and duties that are the subject



of the rules and, since it did not, the rules were not within the "particular powers and duties" granted by the enabling statute. Consolidated-Tomoka Land Company, et al. v. St. Johns River Water Management District, et al., DOAH Case Nos. 97-0870RP and 97-0871RP, Final Order, June 27, 1997. As a result, the proposed rules were invalidated and the decision was appealed by the water management district. The court reversed. The court determined that the proper test to determine whether a rule is a valid exercise of delegated authority pursuant to the 1996 version of the APA:

> is a functional test based on the nature of the power or duty at issue and not the level of detail in the language of the applicable

statute. The question is whether the rule falls within the range of powers the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction. A rule is a valid exercise of delegated legislative authority if it regulates a matter directly within the class of powers and duties identified in the statute to be implemented. This approach meets the legislative goal of restricting the agencies' authority to promulgate rules, and, at the same time, ensures that the agencies will have the authority to perform the essential functions assigned to them by the Legislature. The class of powers and duties delegated to an agency could be defined broadly or specifically depending on the Legislature's objective. For example, a statute authorizing rules pertaining to the general operating functions of an agency might be broadly stated to enable the agency to promulgate a variety of rules, all of



which are within the general class. In contrast, a statute authorizing a regulatory rule might be narrowly tailored to restrict the agency's authority within a precise range. These decisions are ultimately within the province of the Legislature. Tomoka, 717 So. 2d at 80-81.

45. In 1999, the Legislature considered HB 107 and SB 206 that were identical. In material part, HB 107 was written to amend the "flush left" language in Sections 120.52(8) and

120.536(1), Florida Statutes (Supp. 1996), striking the adjective "particular" and replacing it with "detailed." See House of Representatives Committee on Water and Resource Management Bill Research & Economic Impact Statement, HB 107, Dec. 21, 1998, Storage Name: h0107.wrm, page 7. However, in the enacted version of Committee Substitute for House Bill Number 107, the Legislature dropped "detailed" and "particular," and retained "specific" as the adjective before "powers and duties granted by the enabling statute."

46. In 1999, it was the express "intent of the Legislature that modifications contained in [the 1996 amendments to Sections 120.52(8) and 120.536, Florida Statutes, including the amended "flush left" language] which apply to rulemaking are to clarify the limited authority of agencies to adopt rules in accordance with chapter 96-159, Laws of Florida, and are intended to reject the class of powers and duties analysis." Chapter 99-378,



Section 1, at 2280-2281, Laws of Florida (emphasis added). "It [was] not the intent of the Legislature to reverse the result of any specific judicial decision," i.e., Tomoka. Id.

47. Thus, in 1999, the Legislature rejected the "judicial interpretation [in Tomoka] of this standard which created a functional test to determine whether a challenged agency rule is directly within the class of powers and duties identified in the statute to be implemented." House of Representatives Final Analysis, June 30, 1999, page 5 (citation omitted).

48. "The new law [enacted in 1999] gives the agencies authority to 'implement or interpret' specific powers and duties contained in the enabling statute." Save of the Manatee, 773 So. 2d at 599. The court noted, however, that:

> [a] rule that is used to implement or carry out a directive will necessarily contain language more detailed than that used in the directive itself. Likewise, the use of the term 'interpret' suggests that a

> rule will be more detailed than the applicable enabling statute. There would be no need for interpretation if all of the details were contained in the statute itself. It follows that the authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough. Either the enabling statute authorizes the rule at issue or it does not. As the Florida Chamber of Commerce said in its
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> brief, this question is one that must be determined on a case-by-case basis. Id. (emphasis in original).

49. In summary, the Legislature developed a standard for agencies to follow when promulgating rules. But, an agency does not have the authority to adopt a rule merely because the rule "is within the agency's class of powers and duties" because "[an] administrative rule must certainly fall within the class of powers and duties delegated to the agency, but that alone will not make a rule a valid exercise of legislative power." Save the Manatee, 772 So. 2d at 598-599. Further, the court believes the 1999 "flush left" language is unambiguous, thus justifying resort solely to a dictionary to define key terms, e.g., the term "specific." Id. at 599. Importantly, the court held that "the authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute." Id. (emphasis added). This explanation of the standard was re-affirmed in State of Florida, Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 26 Fla. L. Weekly D2240a (Fla. 1st DCA Sept. 13, 2001).

50. Stating the general standard is one thing; it is quite another to apply the standard on a case-by-case basis, as here.

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The duties and powers of the Division.

51. In 1949, the Legislature enacted Chapter 25353, at 777, Laws of Florida. This Chapter created the Florida Board of Parks and Historic Memorials (Florida Board) and provided in part that "[i]t shall be the duty of the board to supervise, administer, regulate and control . . . [t]he operation of all public parks . . .." Id. Section 6, at 779. The powers of the Florida Board were separately stated. Id. Section 7, at 780.

52. The Legislature also provided several "whereas" clauses, including the statements that "WHEREAS, the conservation, development and protection of forests and forest lands is so divergent from the purpose for which the Florida Park service was created, which purpose was to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations, as to require, in the best interest of the people, that the activities be under the administration of separate agencies, and . . . WHEREAS, certain buildings, roads, trails, recreational facilities, utilities and other capital improvements are essential to the full use and enjoyment of the State Parks and are essential to their economical administration and operation." Id. "Whereas Clauses," at 777.

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53. The Florida Board was also given the authority "to make and publish such rules and regulations as it may deem necessary or proper for the management and use of the parks . . . under its jurisdiction . . .." Id. Section 7, at 780.

54. In 1969, as part of the reorganization of state agencies, the Legislature created the Division of Recreation and Parks within the Department of Natural Resources. Chapter 69-106, Section 25, at 543, Laws of Florida. The

Division assumed all of the functions of the Florida Board. Id. at 545.

55. In 1975, the Legislature, enacted the Florida Environmental Reorganization Act of 1975, and in part, reiterated that the Division of Recreation and Parks would be a Division within the Department of Natural Resources, Chapter 75-22, Section 13, at 51, Laws of Florida, and "shall preserve, manage, regulate and protect all parks and recreational areas held by the state . . .." Id. Section 14, at 52.

56. In 1998, the Legislature amended Section 258.007(2), Florida Statutes (1997) as follows: "(2) The division has the authority to adopt rules pursuant to ss. 120.54 and 120.536(1) to implement provisions of law conferring duties on it ~~shall make and publish such rules and regulations as it may deem necessary or proper for the management and use of the parks, monuments, and memorials under its jurisdiction~~, and the



violation of any rule ~~of the rules and regulations~~ authorized by this section shall be a misdemeanor and punishable accordingly." Chapter 98-200, Section 47, at 1842, Laws of Florida (additions are underlined; deletions are stricken through). By enacting Chapter 98-200, in part, the Legislature was "restating rulemaking authority for numerous state officers, departments, divisions, boards, and other entities" including the Division. Id. "Title," at 1828. It appears that the Legislature's goal was greater uniformity among the various general rule-enabling statutes.

57. The Legislature also repealed Section 258.011, Florida Statutes (1997) "[r]ules and regulations for certain parks," which had authorized the Division to "adopt and enforce such rules and regulations as may be necessary for the protection, utilization, development, occupancy, and use of said parks, and consistent with existing laws and with the purpose, or purposes, for which said areas were acquired, designated, and dedicated . . .." Chapter 98-200, Section 48, at 1842. The Legislature did not change the "duties" of the Division.

58. In light of the above, the Division has several statutory "duties" pursuant to Section 258.004(1) and (2), Florida Statutes:

> (1) It shall be the duty[1] of the Division of Recreation and Parks of the Department of Environmental Protection to supervise,[2] administer,[3] regulate,[4] and control[5] the operation[6] of all public parks. . . .
> (2) The Division of Recreation and Parks shall preserve,[7] manage,[8] regulate, and protect[9] all parks and recreational areas held by the state . . .

In the absence of specific statutory definitions, it can be assumed that the words describe the Division's duties according to their ordinary dictionary definitions. Save the Manatee, 773 So. 2d at 599.

59. The Legislature also stated in Section 258.037, Florida Statutes, that it is policy of the Division:

> [t]o promote the state parks system for the use, enjoyment, and benefit of the people of Florida and visitors; to acquire typical portions of the original domain of the state which will be accessible to all of the people, and of such character as to emblemize the state's natural values; conserve these natural values for all time; administer the development, use and maintenance of these lands and render such public service in so doing, in such a manner as to enable the people of Florida and visitors to enjoy these values without depleting them; to contribute materially to the development of a strong mental, moral,

and physical fiber in the people; to provide for perpetual preservation of historic sites and memorials of statewide significance and interpretation of their history to the people; to contribute to the tourist appeal of Florida.

60. The issue for resolution is whether the Legislature intended the statutory "duties" to be "specific (or explicit) duties" which can be implemented or interpreted by Rule 62D-



2.014(18), and in particular, whether the Division, in promulgating Rule 62D-2.014(18), is implementing or interpreting "specific (or explicit) duties" in accordance with the "flush left" language of Sections 120.52(8) and 120.536(1), Florida Statutes. See Save the Manatee, 773 So. 2d at 599.

Rule 62D-2.014(18) does not exceed the Division's grant of rulemaking authority.

61. The Legislature granted the Division the general authority to adopt rules pursuant to Section 258.007(2), Florida Statutes, and "to implement provisions of law conferring duties on it," i.e., Section 258.004, Florida Statutes. (emphasis added). Pursuant to the "flush left" language of Section 120.52(8), Florida Statutes, this grant of rulemaking authority is necessary and has been satisfied. But, does Rule 62D-2.014(18) implement or interpret a specific or explicit statutory duty or power?

62. For over 50 years the Legislature has delegated to the Division, and its predecessor, the specific duties to supervise the operation of all public parks, to administer the operation of all public parks, to regulate the operation of all public parks, and to control the operation of all public parks. The Division also has the duty to "preserve, manage, regulate, and protect all parks and recreational areas held by the state."

63. Public parks and recreation areas include more than picturesque fields, rivers and streams, fauna, and other natural beauty; they also include benches and tables, restrooms, roadways and paths, and other physical attributes.

64. Public parks and recreation areas are frequented by people who visit parks for a myriad of reasons. Over 16 million people visited Florida State parks last year. They stroll about viewing nature at its best; they camp; they boat; they swim; they cook, either alone or in a group; they use restrooms and other facilities. Unfortunately, there are also opportunities for the public to litter, pollute the air somewhat due to vehicle traffic, or to offend, or cause physical harm, to their fellow visitor in some unexpected or perhaps intentional manner or way. While the public has the right to visit a public park, this right is not absolute.

65. Park areas can be dangerous. The park may not be able to accommodate all of the people who may wish to use the park at the same time. Some activities of the public may be liked by some and abhorred by others. There must be some authority to exercise control over the physical property of the park and public activities, which transpire within the park. The public expects that public parks will have reasonable rules, regulating the time, place, and manner in which the public can use the park and this includes free speech activities. It is not



unreasonable to assume that the Legislature understood this when the Division was granted the specific duties described herein.

66. The enumerated statutory duties, by definition, see endnotes 2-10, overlap to some degree, but each has its own special meaning. When viewed collectively, the Division has the specific statutory duty to maintain the physical property in and of the parks in an acceptable manner so that the public can enjoy these public areas and also to supervise, regulate, and control human activity in public parks, as these terms relate to the operation of the public parks. The supervision, administration, regulation, and control of the operation of the parks include the duty to place reasonable

time, place, and manner restrictions on public activity, which includes free speech activity. This is the very essence for the existence of the Division. The Legislature specifically designated the Division, as the responsible state agency, to exercise these functions and to exercise its discretion in a meaningful and fair way.

67. The situation here is different from the circumstances attending the Division of Pari-Mutuel Wagering's attempt to promulgate a rule authorizing the Division of Pari-Mutuel Wagering to conduct warrantless searches of persons and places within pari-mutuel wagering facilities. See Department of Business and Professional Regulation v. Calder Race Course,



Inc., 724 So. 2d 100 (Fla. 1st DCA 1998)(approved in Save the Manatee). First, the Division of Pari-Mutuel Wagering was given the general authority to "adopt reasonable rules for the control, supervision, and direction of all . . . licensees . . .." Id. at 102. The Division of Pari-Mutuel Wagering was not given the specific statutory duty or power to "supervise, administer . . . and control the operation of all" pari-mutuel wagering facilities nor do they have the specific duty to "preserve, manage, . . . and protect" these facilities. The Division of Pari-Mutuel Wagering regulates the facilities; they are not the caretakers of the facilities, directly responsible for the operation of the facilities and the persons who frequent them. Second, the Division of Pari-Mutuel Wagering did not have the specific statutory duty or power to conduct warrantless searches. As noted by the court, the only identifiable authority in the enabling statute to empower the Division of Pari-Mutuel Wagering to conduct the searches was the Division of Pari-Mutuel Wagering's power to carry out investigations. The court rejected the adequacy of this power to support the proposed rule.

68. Rule 62D-2.014(18) implements or interprets the specific or explicit statutory duties enumerated above. Through the Rule, the Division formally advises the public of some, but not all, free speech activities. Free speech activities

are not

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unfettered because they cannot "create a safety hazard or interfere with any other park visitor's enjoyment of the park's natural or cultural experience." This Rule further advises the public to inquire if there are any park "restrictions as to time, place, and manner" which may be specifically applied when a free speech activity is planned. Finally, the Rule advises that "park visitor use patterns and other visitor activities occurring at the time of the free speech activity" will be considered by the park manager when called upon to "determine the suitability of place and manner" restrictions, if any.

69. This Rule broadly explains how the Division supervises, administers, regulates, and controls the operations of all the public parks regarding free speech activities and is a valid attempt to implement or interpret specific or explicit statutory duties.

70. Throughout the Petition, there are allegations that Rule 62D-2.014(18) is an unconstitutional prior restraint on free speech. Whether Rule 62D-2.014(18) is unconstitutional on its face or as applied is beyond the scope of this Final Order. The Division of Administrative Hearings does not have the jurisdiction or authority to pass on the constitutionality of an existing rule. See Key Haven Association Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund, 427 So. 2d 153 (Fla. 1982).

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Rule 62D-2.014(18), Florida Administrative Code, is not vague, does not fail to establish adequate standards for Division decisions, nor vests unbridled discretion in the Division.

71. Frandsen also alleges that Rule 62D-2.014(18) is vague, fails to establish adequate standards for agency discretion, and vests unbridled discretion in the agency. Rule 62D-2.014(18) is a valid exercise of delegated legislative authority.

72. In paragraph 4 of his Petition, Frandsen alleges that Rule 62D-2.014(18) gives the Division unbridled discretion because it does not contain a time limit within which the park manager must respond to inquiries about time, place, and manner restrictions, thereby allowing the park manager to effectively limit free speech by inaction.

73. While Frandsen and others feel it is imperative to receive authority from the Division prior to conducting their proposed park activity, the Rule, on its face, does not require contact with the park manager nor expressly require a permit or license prior to conducting free speech activities. See Naturist, 858 F. Supp. at 1570-1571, regarding the former rule. The Division tries to respond expeditiously to inquiries, although some complex questions require more response time. The lack of a specific response time is not fatal. "Where a time period is not specified, courts will normally infer that a



reasonable time was intended." Kennedy v. Crawford, 479 So. 2d 758, 761 n. 5 (Fla. 3d DCA 1985). See also Roberts v. Askew, 260 So. 2d 492 (Fla. 1972). On this record, the lack of a specific time limit to respond to inquiries does not give the Division unbridled discretion. Any decision, which may arise as a result of the application of the Rule and the Division's case by- case determinations, is subject to challenge. Hasper.

74. In paragraph 6 of his Petition, Frandsen alleges that the Rule is vague because it states that free speech activities "include, but are not limited to, public speaking, performances, distribution of printed material, displays, and signs." (emphasis in original).

75. This Rule is different from other rules because the "include, but are not limited to" language does not proscribe conduct on its face and does not describe any punishment if a person performs a free speech activity not included in the list of examples.

76. Moreover, the list of examples is not meant to exhaustive and, as interpreted by the Division, the term

"include, but are not limited to" means anything that is covered by the First Amendment, whether it be oral, written, or symbolic conduct or speech. See generally Mayo v. City of Sarasota, 503 So. 2d 347, 349 (Fla. 2d DCA 1987) (applying the doctrine of ejusdem generis to a city personnel rule)("Under the doctrine of

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ejusdem gereris where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase will usually be construed to refer to things of the same kind or species as those specifically enumerated.")

77. It is neither practicable nor required for the Division to list every authorized free speech activity. Any attempt at an exhaustive list would be incomplete.

78. The general test for vagueness "is whether the statute [here the Rule] gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct." State of Florida v. Pavon, 26 Fla. L. Weekly D2107a (Fla. 4th DCA Aug. 29, 2001)(citing Brown v. State, 629 So. 2d 841, 842 (Fla. 1994)). The limited list of examples of free speech activities does not make the Rule impermissibly vague.10

79. Frandsen alleges in paragraphs 9, 10, 11, and 12 of the Petition that the Rule vests park managers with unbridled discretion to restrict free speech activities. Essentially, Frandsen argues that the terms "safety hazard," "visitor's enjoyment" and "visitor use patterns" do not provide park managers with sufficient standards when deciding on appropriate time, place, or manner restrictions. However, these terms have definite, yet broad, meanings and park managers are in the best position to evaluate the conditions at the parks they manage and

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decide on appropriate restrictions based on the proposed activity and the guidelines articulated in the Rule.

80. In addition, it is not Rule 62D-2.014(18), which gives the Division or park managers the discretion to regulate and control activities in state parks. Rather, it is Section 258.004(1)(2), Florida Statutes, that grants the

Division this authority. The Division then delegated some of this authority to the park managers who are responsible for the daily operation of their parks. Therefore, this is not a case where the Rule confers unbridled discretion on the Division. A rule is not invalid "simply because [the] 'governing statutes, not the challenged rule, confer . . . discretion.'" Florida Public Service Commission v. Florida Waterworks Association, 731 So. 2d 836, 843 (Fla. 1st DCA 1999) (quoting Cortes v. Board of Regents, 655 So. 2d 132, 138 (Fla. 1st DCA 1995)). The duties of the Division specified in the statute are broad and, therefore, rulemaking latitude is similarly broad.

81. Whether a particular time, place, or manner restriction is appropriate will depend on a number of factors including such things as the park involved, the type of activity, the time of year and the time of day. In this case, it is a determination which must be made on a case-by-case basis because it is not practicable for the Division to list a set of time, place, and manner restrictions for every conceivable free



speech activity which could potentially be held in each of the 155 state parks, 365 days of the year for the foreseeable future.

82. The Florida Supreme Court has recognized and supported the principle that rules may clarify and flesh out the details of an enabling statute. Agencies utilize their expertise by creating rules to effectuate specific duties. "The Legislature itself is hardly suited to anticipate the endless variety of situations that may occur or to rigidly prescribe the conditions or solutions to the often fact-specific situations that arise. " Avatar Development Corporation v. State, 723 So. 2d 199, 204 (Fla. 1998). See also Southwest Florida Management District v. Charlotte County, 774 So. 2d 903, 917 (Fla. 3d DCA 2001) (quoting Cole Vision Corporation v. Department of Business and Professional Regulation, 688 So. 2d 404, 410 (Fla. 1st DCA 1997)("The sufficiency of a rule's standards and guidelines may depend on the subject matter dealt with and the degree of difficulty involved in

articulating finite standards.") and Environmental Trust v. State, Department of Environmental Protection, 714 So. 2d 493, 498 (Fla. 1st DCA 1998)("An agency statement explaining how an existing rule of general applicability will be applied in a particular set of facts is itself not a rule. If that were true, the agency would be forced to adopt a rule for every possible variation on a theme,

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and private entities could continuously attack the government for its failure to have a rule that precisely addresses the facts at issue. Instead, these matters are left for the adjudication process under section 120.57, Florida Statutes."

83. The specific time, place and manner restrictions, if any, placed on any particular activity presents a narrow question that must be addressed on a case-by-case basis. A person who believes that any imposed restrictions are inappropriate for any reason can challenge the agency action pursuant to Sections 120.569 or 120.57, Florida Statutes. Environmental Trust; Hasper.

84. Frandsen further alleges in paragraph 13 of the Petition that the Rule is invalid because it does not provide for administrative or judicial appeal of any specific time, place, or manner restrictions imposed by the Division. It is alleged that this gives the Division unbridled discretion to limit free speech. However, this is not the case and as stated above, any particular restrictions placed on a person can be challenged through the APA.

85. Based upon the foregoing, Rule 62D-2.014(18) is not vague, does not fail to establish adequate standards for Division decisions, and does not vest unbridled discretion in the Division.

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DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, it is:

ORDERED that the Petition to declare Rule 62D-2.014(18), Florida Administrative Code, invalid is dismissed.

DONE AND ORDERED this 26th day of September, 2001, in Tallahassee, Leon County, Florida.

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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of September, 2001.

ENDNOTES

1/ "Duty," means "1. An act or a course of action required of one by position, custom, law, or religion . . .. 3. A service, action, or task assigned to one esp. in the armed forces. 4. Function or work: SERVICE . . .." Webster's II New College Dictionary 352 (1999).

2/ "Supervise," means "To direct and watch over the work and performance of." Id. at 1107.

3/ "Administer," means "1. To have charge of: MANAGE . . .." Id. at 14.

4/ "Regulate," means "To control or direct in agreement with a rule. 2. To adjust in conformity to a requirement or specification . . .." Id. at 934.

5/ "Control," . . . means "1. Authority or ability to regulate, direct, or influence . . .." Id. at 246.

6/ "Operation," means "1. An act, process, or way of operating . . .." Id. at 767.

7/ "Preserve," means "1. To keep safe, as from injury or peril: PROTECT . . .." Id. at 874.

8/ "Manage," means "1. To direct or control the use of. 2.a. To exert control over . . .." Id. at 664.

9/ "Protect," means "1. To keep from harm, attack, or injury: GUARD . . .. Id. at 889.

10/ In McGuire v. State, 489 So. 2d 729 (Fla. 1986), the court upheld the validity of a former park clothing rule in response to a vagueness challenge. The rule provided in pertinent part: "In every bathing area all persons shall be clothed as to prevent any indecent exposure of the person. All bathing costumes shall conform to commonly accepted standards at all times." While noting that the rule could and should have been more precise, the court nevertheless held that "McGuire ha[d] failed to demonstrate that the regulation at issue [was] so vague as to fail to put her on notice that her activities were proscribed." Id. at 732.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.

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**EXCERPTS FROM PETITIONER/APPELLANT BRIEF TO FLORIDA FIRST DISTRICT COURT OF APPEAL, - SHOWING FEDERAL QUESTIONS WERE TIMELY AND PROPERLY RAISED -**

**SEE SUPREME COURT RULE 14(1)(i)(v)**

II. THE RULE IS UNCONSTITUTIONAL UNDER FLORIDA AND U.S. CONSTITUTIONAL GUARANTEES OF DUE PROCESS, AND UNDER FLORIDA CONSTITUTION PROHIBITIONS OF IMPROPER DELEGATION.

Standard of Review: *De novo* as a facial issue of constitutional law.

Under the Florida Constitution, FS 258.004 as the purported governing statute for the Rule cannot be constitutionally sufficient to support any penal rule because FS 258.004 lacks any directive standards from the Legislature to the Division as to how its duties shall be performed as per penal rulemaking.

The Florida Supreme Court has long held that legislative delegation to administrative agencies may be performed "provided that in doing so it announced adequate standards to guide the ministerial agency in the execution of the powers delegated." Delta Truck Brokers, Inc. v. King, 142 So.2d 273, 1962.FL.151, P. 23 (Fla. 7 Mar 1962)(VL). However "It is essential that the act which delegates the power likewise defines with reasonable certainty the standards which shall guide the agency in the exercise of the power." Id. at P. 23. An administrative agency "may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying the law." Husband v. Cassel, 130 So.2d 69, 1961.FL.249, P. 18-19 (Fla. 1961)(VL).

FS 258.004 on its face fails to provide any limits to the unbridled discretion of the Division in executing the broadly stated duties. Where the police power is involved explicit

limits are essential or the power to delegate does not exist. Mahon v. County of Sarasota, 177 So.2d 665, 666 (Fla. 1965)("such legislative exercise of the police power should be so clearly defined, so limited in scope, that nothing is left to the unbridled discretion or whim of the administrative agency charged with responsibility of enforcing the Act.") Dickinson v. State, 227 So.2d 36, 37 (Fla. 1969)(same). State v. Mitchell, 652 So.2d 473, 478 (Fla. 2d DCA 1995)("The legislature may not delegate open-ended authority such that 'no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law.' ... The delegation of authority to define a crime ... is of such a different magnitude from non-criminal cases that more stringent rules and greater scrutiny certainly is required.") City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801, 805 (Fla. 1972)(" 'No matter how laudable a piece of legislation may be in the minds of its sponsors, objective guidelines and standards should appear expressly in the act or be within the realm of reasonable inference from the language of the act where a delegation of power is involved.' ") Id. at 805. ("Unrestricted discretion in the application of a law without appropriate guidelines and determining its meaning may not be delegated ... to an agency or to one person.")

Similarly the Rule itself attempts an unconstitutional delegation of legislative authority to individual Division employees because the Rule itself allows an official to decide to whom the Rule applies, and then to apply the rule without objective standards. Id. at 805. Sarasota County v. Barg, 302 So.2d 737, 742 (Fla. 1974)(Similar to the Rule, "The Act, however, does not provide us with any definition of 'undue', 'unreasonable', 'harmful', or 'significantly contribute'. The Act does not contain any standards or guidelines to aid any court or administrative body in interpreting these terms. The determination of what conduct falls within the proscription of these ambiguous provisions is left to the unbridled discretion of those responsible for applying and enforcing the Act. This amounts to an unrestricted delegation of legislative authority, in violation of the Florida Constitution, Article II, Section 3, F.S.A.")

Referring to this legislative approach the Florida Supreme Court has stated that "such an attempted delegation necessarily creates the simultaneous violation of article I, section 9 and article II, section 3 of the Florida Constitution. In other words, there is a due process violation for the statute's failure on its face to give adequate notice of the prohibited act; and there is a violation of the separation of powers". B.H. v. State, 645 So.2d 987, 993 (Fla. 1994).

The Rule's public enjoyment clause is also unconstitutional as a violation of separation of powers and due process for its reliance on the unbridled discretion of 'any' member of the public to be unhappy and thereby veto a free speech activity's TPM. Mahon v. County of Sarasota, 177 So.2d 665, 667 (Fla. 1965)("the execution of a statute cannot be made to depend on the unbridled discretion of a single individual or an unduly limited group of individuals.")

The U.S. Supreme Court has condemned the Rule's approach of case-by-case application of standardless language as unconstitutional on due process and delegation grounds: "Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their predilections. Legislature may not so abdicate their responsibilities for setting the standards of criminal law. ... Mr. Justice Black in a concurring opinion, voiced a concern, which we share, against entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat.' ... Where inherently vague statutory language permits such selective law enforcement, there is a denial of due process." Smith v. Goguen, 415 U.S. 566, 575-576 (1974). Id. at 578: "This absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause. The deficiency is particularly objectionable in view of the unfettered latitude thereby accorded law enforcement officials and triers of fact." Grayned v. City of Rockford, 408 U.S. 104, 109 (1972)("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.") Beckerman v. City of Tupelo, Mississippi, 664

F.2d 502, 511 (5th Cir. 1981)("Arbitrary and discriminatory law enforcement cannot be prevented unless statutes provide definite standards for those who apply them.") State v. Llopis, 257 So.2d 17, 19 (Fla. 1971)("the Legislature must inform our citizen with reasonable precision what acts are prohibited. There must be provided an ascertainable standard of guilt, a barometer of conduct must be established, so that no person will be forced to act at his peril.") Id. at 18. (The "standard of guilt cannot be left to be supplied by courts or juries.") Severson v. Duff, 322 F.Supp. 4, 6 (M.D. Fla. 1970)(A statute is vague when "police and prosecutors evolve their own rational standards of enforcement, constituting an inappropriate delegation of criminal lawmaking authority.")

## III. THE RULE IS UNCONSTITUTIONAL UNDER THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellate Standard of Review for First Amendment Issues: Both findings of fact and findings of law are reviewed *de novo*. This is true for two reasons. First, the administrative court below did not make any findings of fact or law related to any constitutional issue [R379-380:2, R405:70]. Second, in a case raising First Amendment issues the U.S. Supreme Court has "repeatedly held that an appellate court has an obligation to 'make an independent examination of the "whole record" in order to make sure "that the judgment does not constitute a forbidden intrusion on the field of free expression" ' ". Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984). This independent examination is conducted without deference to the factual findings of the trial court. Bery v. City of New York, 97 F.3d 689, 693 (2d Cir. 1996). (Such a 'fresh examination of crucial facts' is necessary even in the fact of the 'clearly erroneous standard of factual review set for in Rule 52(a) ..."). Hurley v. Irish-American Gay Group, 515 U.S. --, 115 S.Ct. --, 132 L.Ed.2d 487, 499-500 (1995)(Requirement of independent appellate review in First

Amendment cases is a rule of federal constitutional law which is conducted without deference to the trial court and which supersedes court rules. "We are obligated to make a fresh examination of crucial facts.").

A. The Rule is Unconstitutionally Overbroad Under the First Amendment Due to Allowing and Mandating Content-Based TPM Restrictions.

On its face and as evidenced in the record [F. 49-57], the Rule's public enjoyment clause mandates that park officials institute content-based TPM restrictions in order to mitigate possible public offense at the content of speech.

A content-based TPM restriction is a constitutional oxymoron. E.g., Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980)("we have emphasized that time, place and manner regulations must be 'applicable to all speech regardless of content.'").

Regulating or preventing speech in order to keep the public happy is content-dependent regulation and is unconstitutional. Terminiello v. Chicago, 337 U.S. 1, 4 (1949)("a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.") Edwards v. South Carolina, 372 U.S. 229, 238 (1963)(A conviction for speech which stirs people to anger, invites public dispute, or brings about a condition of unrest may not stand.) Cohen v. California, 403 U.S. 15, 25 (1971)("so long as the means are peaceful, the communication need not meet standards of acceptability.") Weigand v. Seaver, 504 F.2d 303, 306-307 (5th Cir. 1974)("The fact that some speech may stir listeners to disagree - perhaps even to disagree violently - does not by that fact alone permit regulation.") Erzoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975)("when the government, acting as censor, undertakes selectively to shield the public from some kinds

of speech on ground that they are more offensive than others, the First Amendment strictly limits its power".) Id. at 210. ("the Constitution does not permit government to decide which other types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer".) Texas v. Johnson, 491 U.S. 397 (1989)(" 'the emotive impact of speech on its audience is not a secondary effect' unrelated to the content of the expression"). Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972)("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.")

The Rule's public enjoyment clause is an impermissible 'heckler's veto' on free speech activities. Forsyth Cy v. Nationalist Movement, 505 U.S. --, 120 L.Ed.2d 101, 114 (1992)(Speech cannot burdened "simply because it might offend a hostile mob." Regulations which "permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.") Beckerman v. City of Tupelo, Mississippi, 664 F.2d 502, 509 (5th Cir. 1981)("There is a host of Supreme Court cases dealing with the issue of the 'heckler's veto.' In almost every instance it is not acceptable for the state to prevent a speaker from exercising his constitutional rights because of the reaction to him by others.") Young v. City of Simi Valley, No. 97-56484, 2000.C09.0042344, P. 55 (9th Cir. 20 Jun 2000)(VL)(Local government may not delegate to favored private parties the unfettered power to veto, without standards or reasons, another's right to engage in constitutionally protected freedom of expression.") Lewis v. Wilson, No. 00-2149, 2001.C08.0000748, P. 28 (8th Cir. 12 Jun 2001)(VL)("the mere possibility of a violent reaction to Ms. Lewis' speech is simply not a constitutional basis on which to restrict her right to speak. ... 'The argument amounts to little more than the self-defeating proposition that to avoid physical censorship ... the States may more appropriately effectuate that censorship themselves ... The first amendment knows no heckler's veto.")

The powers given to the Division under the Rule to screen or otherwise inhibit exhibition of free speech material

in order to protect public 'enjoyment' [F. 54] constitutes a blunt instrument of pure censorship. Kincaid v. Gibson, No. 98-5385, 2001.C06.0000005, P. 57 (6th Cir. 5 Jan 2001)(VL) ("There is little if any difference between hiding from public view the words and pictures students use ... and forcing students to publish a state-sponsored script.")

B. The Rule is Unconstitutionally Vague and Overbroad Under the 1st, 5th and 14th Amendments Due to Allowing Excessive Discretion

Statutory vagueness and official discretion are inherently incompatible with 1st, 5th and 14th Amendment (free speech, due process and equal protection) guarantees because of the danger of covert discrimination by content. Lakewood v. Plain Dealer, 486 U.S. 750, 758 (1988)(Without express standards post hoc rationalizations and the use of shifting criteria are far too easy, making it difficult for any reviewing court to determine if an official is discriminating for illicit reasons.) Gentile v. State Bar of Nevada, 501 U.S. 1030, 1051 (1991)("The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement.") *Consolidated Edison, supra* at 536. (TPM regulations cannot be content dependent.) Latitude for discriminatory enforcement is also barred by the 14th Amendment. Burson v. Freeman, 504 U.S. --, 119 L.Ed.2d 5, 13 n. 3 (1992)("Content-based restrictions also have been held to raise Fourteenth Amendment equal-protection concerns because, in the course of regulating speech, such restrictions differentiate between types of speech.")

On its face and as evidenced in the record [F. 24-25, 28-29, 47, 49-51, 56, 61, 63-64, 67], under the Rule TPM restrictions are placed on a case-by-case basis according to the discretion of park officials. Discretionary levying of TPM restrictions is unconstitutional. Forsyth Cy. v. Nationalist Movement, 505 U.S. --, 112 S.Ct. --, 120 L.Ed.2d 101, 111

(1992)("A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.' ") Crowder v. Housing Authority of City of Atlanta, 990 F.2d 586, 591 (11th Cir. 1993)("A restriction which vests unlimited discretion in a government actor, however, opens the way to arbitrary suppression of particular points of view. Such arbitrariness is inherently inconsistent with a valid time, place and manner regulation.' ") Southeastern Promotions, Ltd. v. City of West Palm Beach, 457 F.2d 1016, 1020 (5th Cir. 1972)("it is beyond the pale of possibility that our Constitution would vest in an auditorium manager, in the context of his sole and individual emotions, attitudes, philosophies, and all the other ganglia that make up the human personality, the autocratic power to shamble our revered First Amendment.") Cox v. Louisiana, 379 U.S. 536, 557 (1965)(Broad discretion "sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor.") Lady J Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358, 1362 (11th Cir. 1999)(Fire safety code specifying that buildings must be 'sufficiently accessible' ruled unconstitutionally vague in a free speech context.)

Whether or not an official's discretion is actually abused or not is constitutionally irrelevant. The mere existence of unbridled discretion provided by standardless statutes or rules is constitutionally intolerable. Lakewood v. Plain Dealer, 486 U.S. 750, 757 (1988)(Mere existence of discretionary power over speech intimidates parties into censoring their own speech, even if the discretion and power are never actually used.) Roaden v. Kentucky, 413 U.S. 496, 504-505 (1973)(It is impossible to leave the protections of freedoms to the whims of officers.) Redner v. Dean, 29 F.3d 1495, 1501 (11th Cir. 1994)("[w]e cannot depend on those individuals responsible for enforcing the Ordinance to do so in a manner that cures it of constitutional infirmities.") Beckerman v. City of Tupelo, Mississippi, 664 F.2d 502, 511 (5th Cir. 1981)("Arbitrary and discriminatory law enforcement cannot be prevented unless statutes provide

definite standards for those who apply them.") Women Strike for Peace v. Morton, 472 F.2d 1273, 1291 (D.C. Cir. 1972)("those officials assure us that the discretion is exercised with an eye to the public interest and basic park values. But the Supreme Court has repeatedly held that such standards, even with official assurances of good faith, offer insufficient protection to First Amendment freedoms.") U.S. v. Doe, 968 F.2d 86, 90 (D.C. Cir. 1992)("Where constitutionally protected activity is implicated, we cannot simply defer to the Park Service's unexplained judgment.") NAACP v. Button, 371 U.S. 415, 438 (1963)("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.") Id. at 433. ("The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment Freedoms, the existence of a penal statute susceptible of sweeping and improper application ... These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.")

C. The Rule's Terms Are Unconstitutional due to Vagueness and Discretion.

Numerous courts have ruled that the terms employed by the Rule, or terms virtually and functionally identical to those employed, are unconstitutional.

'Safety Hazard': Shuttlesworth v. Birmingham, 394 U.S. 147, 150 (1969)(Ordinance improperly allowed officials to restrain speech according to their own ideas of safety.) Fernandes v. Limmer, 663 F.2d 619, 631 (5th Cir. 1981)(Allowing an official to regulate speech depending on the official's ad hoc good reason perception of a 'direct and immediate danger or hazard to the public security, health, safety' held to constitute unbridled discretion.) Naturist Society, Inc. v. Fillyaw, 858 F.Supp. 1559, 1570 (S.D. Fla. 1994)(The phrase "present a clear and present danger to the

public health and safety" ruled unconstitutionally vague and discretionary.) Rubin v. City of Santa Monica, 823 F.Supp. 709, 713 (C.D. Ca. 1993)("the ordinance is impermissibly vague as it does not define 'public nuisance' or 'detrimental to public health and safety.' "). Campbell v. Brevard County, No. 95-1219-CIV-ORL-22 (M.D. Fla. 1996)(Leaving determination of which facilities and which activities constitute a 'hazard' to official judgment constitutes unbridled discretion.)

Public Enjoyment Clause: Shuttlesworth v. Birmingham, 394 U.S. 147, 150 (1969)(Officials cannot be allowed to be guided only by their own ideas of "public welfare, peace, safety, health, decency, good order, morals or convenience."). LeFlore v. Robinson, 434 F.2d 933, 941 (5th Cir. 1970)('Peace and tranquillity' language unconstitutional because terms could make criminal the peaceful expression of unpopular views.) Gilbreath v. State, 650 So.2d 10, 1995.FL.236, P. 38 (Fla. 1995)(VL)(" 'Offend' and 'annoy' are indefinite as to meaning and give rise to subjective vague connotations.") Naturist Society v. Fillyaw, *supra*, at 1570. (Phrase "unreasonably impair the atmosphere of peace and tranquillity" found unconstitutionally vague and discretionary.) Connor v. Palm Beach County, 1996 WL 438779, p. 10 (S.D. Fla. 1996)(Phrase "cause interference to ... proper uses of a park or recreational area" unconstitutional for too much discretion.)

D. The Rule is Unconstitutionally Overbroad Under the 1st, 5th and 14th Amendments to the U.S. Constitution Due to Imposing Unconstitutional Prior Restraints And Failing to Provide Prior Restraint Due Process Safeguards.

Prior restraints are often understood as permit schemes. However prior restraints are not limited to permit schemes. One reason the Rule is a prior restraint is that unbridled official discretion to regulate speech is itself a prior

restraint. Cox v. Louisiana, 379 U.S. 536, 557 (1965)(Selective enforcement of an extremely broad prohibitory statute is legally equivalent to a statute providing broad discretionary licensing power.) Cannabis Action Network, Inc. v. City of Gainesville, 231 F.3d 761, 771 (11th Cir. 2000)(Various ordinances struck down as prior restraints on speech because the right to be heard is placed in the uncontrolled discretion of the government official.) FW/PBS, Inc. v. Dallas, 493 U.S. 215, 225-226 (1990)("a scheme that places 'unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.' ")

The danger and fact of prior restraint via discretion is particularly acute when, as in my case, speakers are critical of the government [F. 41-42], may in speaking to controversial topics run afoul of the Rule's public enjoyment clause by upsetting some members of the public [F. 26], are dependent on logistical predictability which under the Rule cannot be assured in advance [F. 28-42], and sincerely fear the Division [F. 41-42]. Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)("The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.") Gentile v. State Bar of Nevada, 501 U.S. 1030, 1051 (1991)("history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law.") Pittsburgh Press Co. v. Human Rela. Comm., 413 U.S. 376, 390 (1973)("The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker".) Grayned v. City of Rockford, 408 U.S. 104, 109 (1972)(Uncertain meanings "inevitably" lead citizens to engage in self-censorship by steering far wide from the unlawful zone.) Virginia v. American Booksellers Assoc., 484 U.S. 383, 393 (1983)(Self-censorship is harm that can be realized without actual prosecution.) Reno v. ACLU, 521 U.S. 844, 138 L.Ed.2d 874, 898 (1997)("The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words,

ideas, and images.") ACLU v. Reno, 31 F.Supp.2d 473, 493 (E.D. Pa. 1999)("A statute which has the effect of deterring speech, even if not totally suppressing speech, is a restraint on free expression.")

Again, whether or not the discretion is actually abused is constitutionally irrelevant. Thornhill v. Alabama, 310 U.S. 88, 97 (1940)("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.")

Second, the Rule is an unconstitutional prior restraint on its face as the public enjoyment clause forbids speakers to 'interfere' with the public 'enjoyment' in any way, including purely emotional responses to content or appearance [F. 49-57]. E.g., Cohen v. California, 403 U.S. 15, 21 (1971)(condemning a view of governmental authority which in public "would effectively empower a majority to silence dissidents simply as a matter of personal predilections.")

Third, the Rule acts as a prior restraint because purported "TPM" restrictions which are actually prior restraints can be and are freely issued by the Division under color of the Rule. (This is not a new vice. Broadrick v. Oklahoma, 413 U.S. 601, 612-613 (1973)("delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights."))

Examples include the power to physically remove speakers, limit duration and frequency of free speech activities to extremes that are indistinguishable from forbidding speech [F. 54] as well as overt censorship via screening [F. 54] and the banning all sound amplification subject to the discretion of the park manager [F. 43-48]. Saia v. New York, 334 U.S. 558, 560-561 (1948)(In re sound amplification, "The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and lengthy appeal. A more effective previous restraint is difficult to imagine.") Cannabis Action Network, Inc. v. City of

Gainesville, 231 F.3d 761, 771 (11th Cir. 2000)("The Supreme Court likened the sound ordinance to other ordinances previously struck down as prior restraints on speech ... because all four had the same defect - the right to be heard is placed in the uncontrolled discretion of the Chief of Police ... The Sound Ordinance is a prior restraint on speech ...").

Any prior restraint is presumed to be unconstitutional. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1975)("prior restraints on speech ... are the most serious and least tolerable infringement on First Amendment rights.") Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 317 (1980)("Any prior restraint on the exercise of First Amendment rights ... comes to this court bearing a heavy presumption against its constitutional validity.")

At a minimum prior restraints must observe safeguards set out in Freedman v. Maryland, 380 U.S. 51 (1965). These requirements are applicable to regulation of grass roots speakers in public fora, U.S. v. Frandsen, 212 F.3d 1231, 1238 (11th Cir. 2000), and include: "(1) the burden of going to court to suppress the speech, and the burden of proof once in court, must rest with the government; (2) any restraint prior to a judicial determination may only be for a specified brief time period in order to preserve the status quo; and (3) an avenue for prompt judicial review of the censor's decision must be available." Id. at 1238.

The second safeguard means that park officials must respond within a definite time limit ("without unreasonable delay" held unconstitutional, Id. at 1240). The Rule does not provide this safeguard because a speaker who must know the ground rules before speaking or else engage in self-censorship [F. 36-42] cannot know in advance what the TPM restrictions will be [F. 28-30], and may not be able to find out for an indeterminate length of time [F. 29-32]. Although the Division claims to be 'expeditious' any 'complexities' may stretch the indeterminacy out for weeks or even months [F. 32-33]. The 11th Circuit has noted the prior restraint danger of this sort of discretion: "A park superintendent who does not agree with the political message to be espoused could allow the permit request [or TPM restrictions request] to sit on his desk for an indefinite period of time-resulting in

speech being silenced by inaction." Id. at 1240. FW/PBS, Inc. v. Dallas, 493 U.S. 215, 227 (1990)("A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech.") Such delays irreparably impair First Amendment rights. NAACP Western Region v. City of Richmond, 743 F.2d 1346, 1356 (9th Cir. 1984)("A delay 'of even a day or two' may be intolerable when applied to 'political' speech in which the element of timeliness may be important.")

The first safeguard (that the government bear the burden of judicial review) is also necessary for grass roots speakers in public fora such as parks. Cannabis Action Network, Inc. v. City of Gainesville, 231 F.3d 761, 775-776 (11th Cir. 2000). This requirement is clearly not met under the Rule [F. 67-68]. First, filing a petition under FS 120.569 and FS 120.57, as suggested by the ALJ [R411:83] and thereby engaging in quasi-judicial administrative review is a burden explicitly borne by the speaker, not by the government. Second, review in administrative court is not 'judicial' review. Third, a petitioner is denied constitutional review in administrative court, which is designed solely for APA issues. Key Haven v. Bd. of Trustees of Internal Imp., 427 So.2d 153, 157-158 (Fla. 1982).

## CONCLUSION

The Rule is an invalid delegation of legislative authority under the APA. The Rule is unconstitutional under the Florida Constitution for violations of due process and separation of powers. The Rule is unconstitutional under the U.S. Constitution for violations of First Amendment, Due Process and Equal Protection guarantees. WHEREFORE, I pray this Honorable Court will declare the Rule invalid under the APA and unconstitutional under both the U.S. and Florida Constitutions.

## EXCERPT FROM DEP ANSWER BRIEF TO FLORIDA FIRST DISTRICT COURT OF APPEAL, IN RE TO REGULATION OF NON-SPEECH CONDUCT

"In order to implement the Division's duty to manage the parks for the enjoyment of the public, the agency has promulgated rules prohibiting or regulating "any activity that lessens the safety or recreational experience of the visiting public or lessens the natural or cultural value of the park." Fla. Admin. Code R. 62D-2.014(1). Rules address entrance fees, traffic control, speed and location of vehicles (allowed only where designated), swimming (not where prohibited), nudity (prohibited), boating (not where prohibited), fishing (not where prohibited), hunting (prohibited except as authorized in specific areas), alcoholic beverages (prohibited except in restaurants and lodges), domestic animals (restricted), merchandising (prohibited unless authorized), aircraft (restricted), hours of opening and closing, photography (restricted), and free speech activities." Appellee's Answer Brief, pp. 11-12.

Published as: Frandsen v. Environmental Protection, 829 So.2d 267 (Fla.App. 1 Dist. 2002)

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

MARVIN FRANDSEN, NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND
Appellant, DISPOSITION THEREOF IF FILED

v. CASE NO. 1D01-4267

DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Appellee.
_____/

Opinion filed September 12, 2002.

An appeal from the Department of Administrative Hearings. Charles A. Stampelos, Administrative Law Judge.

Dr. Marvin Frandsen, Pro Se, for Appellant.

Maureen M. Malvern, Senior Assistant General Counsel, Department of Environmental Protection, Tallahassee, for Appellee.

PER CURIAM.

Appellant, Marvin Vaun Frandsen, challenged Florida Administrative Code Rule 62D-2.014(18) as being an invalid exercise of delegated legislative authority.

The Administrative Law Judge found that the rule was valid. On appeal, Appellant also argues that Rule 62D-2.014(18)1 is unconstitutional on its face.[2] We affirm.

An agency may adopt rules "only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the (proposed) rule implements or interprets specific powers or duties . . . ." State, Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Assoc., Inc., 794 So. 2d 696, 700 (Fla. 1st DCA 2001). "The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough." Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000). In this case, in section 258.007(2), Florida Statutes (1999), the Legislature granted the Division of Recreation and Parks the authority to make rules to carry out its specific duties. It also established that the Division's specific duties were to

[1] Rule 62D-2.014(18), entitled "Free Speech Activities," says:

Free speech activities include, but are not limited to, public speaking, performances, distribution of printed material, displays, and signs. Free speech activities do not include activities for commercial purposes. Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. Free speech activities shall not create a safety hazard or interfere with any other park visitor's enjoyment of the park's natural or cultural experience. The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity.

[2] Appellant dropped his pursuit of an as-applied challenge

prior to the final hearing.

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"supervise, administer, regulate, and control the operation of all public parks . . ." and to "preserve, manage, regulate, and protect all parks and recreational areas held by the state . . . ." Sec. 258.004, Fla. Stat. (1999). The rule in question falls under the specific grant of authority and is otherwise a valid exercise of delegated legislative authority. See sec. 120.52(8), Fla. Stat. (2001).

Turning to one of Appellant's constitutional challenges, we first note that the rule does not operate as a prior restraint on speech. "A prior restraint on expression exists when the government can deny access to a forum for expression before the expression occurs." U.S. v. Frandsen, 212 F.3d 1231, 1238-39 (11th Cir. 2000). A park visitor need not obtain a permit or license prior to engaging in any free speech activity under the rule.

The government may restrict expression, even in a public forum like a state park, as long as the restrictions on the time, place, and manner of the protected speech are reasonable. The restrictions must be "justified without reference to the content of the regulated speech, . . . [be] narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." Daley v. Sarasota, 752 So. 2d 124, 126 (Fla. 2d DCA 2000) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

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In Rock Against Racism, 491 U.S. at 791-92 (citations omitted) the United States Supreme Court said:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves

> purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

In this case, the rule operates as a warning that time, place, and manner restrictions may apply to a free speech activity. It is not concerned with the content of the expression but with the operation of the parks. Thus, it is content-neutral.

Next, the question is whether the rule is narrowly tailored to serve a significant government interest. Clearly, the state has a significant interest "in maintaining the parks . . . in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 296 (1984). The state's interest in regulating its parks through time, place, and manner restrictions on free speech activities has been discussed before:

> However, the state may have a legitimate interest in providing a certain degree of privacy and freedom from demonstrators in particular areas of the park, to the extent that may be necessary to prevent interference with the intended use of those areas. Such a necessity arises in this case by virtue of the state's second asserted interest: providing park
>
> 4
>
> visitors with a unique recreational experience based on the natural environment. At the outset, the Court recognizes that this is a significant state interest. It is a well-known fact that tourists and residents alike are attracted to Florida in large part due to its unique natural resources. Consequently, the state of Florida has devoted substantial amounts of time and money to preserving these resources at state-owned parks like MacArthur Beach State Park, and offering these parks as places where individuals may experience the "real" Florida

without the usual distractions of everyday life. The state obviously has a significant interest in continuing to offer, and remaining able to deliver, this unique recreational experience.

In those areas of the park where visitors may experience the park's unique environment on a most intimate level, such as on the beach or the nature trails, they are entitled to some privacy and freedom from solicitation. Without this privacy, a park visitor's ability to appreciate the sights and sounds of nature would be severely undermined. It is certainly within the state's prerogative, therefore, to provide park visitors with freedom from solicitation and demonstrations in those areas of the park where such activity would interfere with the area's primary use: as a place where visitors may relax and "get in touch with nature."

The Naturist Society, Inc. v. Fillyaw, 858 F.Supp. 1559, 1567-68 (S.D. Fla. 1994).

The question for this court, then, is whether the rule is narrowly-tailored. A content-neutral time, place, and manner restriction that serves a legitimate government interest:

> need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."



Rock Against Racism, 491 U.S. at 798-99 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)). Accepting the Department's invitation to construe the phrase "interfere with any other park visitor's enjoyment of the park's natural or cultural experience" narrowly,[3] we find that the rule is narrowly-tailored. Lastly, we find that the rule leaves open

ample, alternative channels for communication.

Thus, we hold that the rule is not an invalid exercise of delegated legislative authority, nor is it an unconstitutional restriction on free speech or otherwise unconstitutional. Accordingly, the order on appeal is AFFIRMED.

MINER, PADOVANO and BROWNING, JJ., CONCUR.

[3] It is axiomatic that the government may not restrict speech on the grounds that someone in the audience may not like what he or she hears. However, the use of the word "enjoyment" in the rule clearly does not give park managers or anyone else the power to restrict speech solely because another park visitor may disagree with the message. The concern is not with the content of the message but with the manner with which it is delivered. The rule forbids getting in the way of other visitors' use of the park –whether it is blocking a nature trail, using sound amplification near a nesting site, erecting signs that block out the sun on the beach, or otherwise interfering "with the area's primary use: as a place where visitors may relax and 'get in touch with nature.'" See generally Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding ordinance that restricted speech that interrupted school).

**DISTRICT COURT OF APPEAL, FIRST DISTRICT**
**Tallahassee, Florida 32399-1850**
**Telephone No. (850) 488-6151**

November 6, 2002

CASE NO.: 1D01-4267
L.T. No.: 01-0527RX

| | | |
|---|---|---|
| Marvin Frandsen | v. | Department of Env. Protection |
| Apellant / Petitioner(s), Respondent(s). | | Apellee / |

BY ORDER OF THE COURT:

Appellant's motion filed September 24, 2002, for rehearing and rehearing en banc is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Marvin Frandsen Suzanne Brantley Maureen M. Malvern

jm

JON S. WHEELER, CLERK

**SUPREME COURT OF FLORIDA**

WEDNESDAY, MAY 7, 2003

CASE NO.: SC02-2577
Lower Tribunal No.: 1D01-4267

MARVIN FRANDSEN vs. FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ANDSTEAD, C.J., and WELLS, QUINCE, CANTERO and BELL, JJ., concur.

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MAUREEN M. MALVERN

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No. 03-211

In The

# Supreme Court of the United States

DR. MARVIN VAUN FRANDSEN,

*Petitioner,*

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION, STATE OF FLORIDA,

*Respondent.*

**On Petition For Writ Of Certiorari To The First District Court Of Appeal For The State Of Florida**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF THE CASE AND FACTS

This case concerns the affirmance by the State of Florida First District Court of Appeal (hereafter "the state court") of a Final Order by an Administrative Law Judge upholding a rule of the Division of Recreation and Parks, part of the Florida Department of Environmental Protection (hereafter "the Department"). The rule addresses expressive activities in state parks.

Petitioner's Statement of the Case includes several erroneous or misleading statements. First, Petitioner's allegation that state park officials have nothing but the text of the rule to guide them, (Init. Brief at 5), ignores the state court's narrow construction of the rule in this case. *See Frandsen v. Department of Environmental Protection*, 829 So. 2d 267, 271 (Fla. 1st DCA 2002) (accepting the Department's invitation to construe the rule narrowly). Second, throughout Petitioner's brief there are references to a "record" that does not reflect facts found by any court or administrative tribunal. (*See* Init. Brief at 5 [alleging Petitioner's own experiences with park officials], 8, 27 [alleging a ban imposed by park officials on sound amplification].) In his administrative appeal, Petitioner dropped any challenge to the rule as applied to him and also dropped his challenge to an agency statement alleged to be an unadopted rule, the letter attached to Petitioner's Initial Brief herein, (Init. Brief App. at 28). (Final Order, Init. Brief App. at 32-33.) Because the "as applied" challenge was no longer an issue, the Administrative Law Judge made no findings of fact with regard to any park official's application of the rule in question to Petitioner or

to anyone else.[1] Contrary to Petitioner's assertions, (Init. Brief at 9, 11), the face of the rule neither authorizes park officials to impose restrictions on speech nor creates any penalty for violation of a park official's instructions. As narrowly construed by the state court, the only sanctionable conduct in the rule ("shall not") is actual creation of a safety hazard or physical interference with other park activities. *Frandsen*, 829 So. 2d at 271; Fla. Admin. Code R. 62D-2.014(18) (Init. Brief App. at 27).

In the Final Order affirmed by the state court, the Administrative Law Judge found: The Department adopted its free speech rule in 1996 "to inform the public that free speech activities are welcome in state parks," (Init. Brief App. at 37); ". . . people are free to conduct any activity they choose so long as the manner in which they do it does not infringe on other park visitors' purpose for coming to the park," (*id.* at 37-38); the rule "does not require contact with a park manager before engaging in" expressive activities, (*id.* at 39); and "[t]he Rule contemplates that the public *may* contact a park manager to ensure that a planned activity will not create a safety hazard or conflict with other planned activities," (*id.* at 39 emphasis added).

On appeal the state court held that the rule does not operate as a prior restraint because "[a] park visitor need not obtain a permit or license prior to engaging in any free speech activity under the rule." *Frandsen*, 829 So. 2d at 269 (citing *United States v. Frandsen*, 212 F.3d 1231 (11th

[1] No arrests have ever been made under the free speech rule. (Tr. at 412.)

Cir. 2000)). The state court quoted and followed this Court's rule of law regarding time, place, and manner restrictions on speech: The restrictions "must be 'justified without reference to the content of the regulated speech, . . . [be] narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.'" *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Applying the rule of law expressed by this Court, the state court found that the park rule is content-neutral, is narrowly tailored to serve a significant governmental interest, and leaves open ample channels for communication. *Frandsen*, 829 So. 2d at 270-71. As to the first criterion, the rule "is not concerned with the content of the expression but with the operation of the parks"; hence the state court found it content-neutral. *Id.* at 270.

As to the second criterion, the state court relied on this Court's holding that the government has a significant interest in "maintaining the parks . . . in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence." *Frandsen*, 829 So. 2d at 270 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984)). Further, the state court found the rule narrowly tailored, applying this Court's holding that the narrow tailoring requirement "is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 270-71 (quoting *Rock Against Racism*, 491 U.S. at 799 (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)). The state court also found the rule met this Court's third

criterion, leaving open "ample channels of communication." *Id.* at 271.

## REASONS FOR DENYING THE WRIT

There is no compelling reason for this Court to grant review of Petitioner's facial challenge to a rule that is content-neutral, has been narrowly construed by the state court, and contains no prior restraint on speech. Certiorari review by this Court is "not a matter of right"; it is granted "only for compelling reasons." Sup. Ct. R. 10. The Court may, in its discretion, grant review of an opinion of a state court of last resort that decided "an important federal question" in a way that conflicts with opinions of this Court, federal appellate courts, or other highest-level state courts. Sup. Ct. R. 10(b),(c). However, a petition for certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. For reasons of both comity and practicality, the Court avoids unnecessary review of state judgments. *See Adams v. Robertson*, 520 U.S. 83, 90-92 (1997) (dismissing writ of certiorari as improvidently granted). In the present case, because the state court properly stated the applicable rules of law and followed the decisions of this Court and of federal appellate courts, there is no reason to grant certiorari review.[2]

[2] Petitioner does not allege any conflict with other highest-level state courts.

## I. THIS FACIAL CHALLENGE SHOULD BE DENIED REVIEW BECAUSE NO PRIOR RESTRAINT IS AT ISSUE.

Preliminarily, it is unclear under this Court's precedents that Petitioner has standing to bring this facial challenge. (*See* Init. Brief at 29-30, Petitioner's sub-issue IX.) Even in a First Amendment context, Petitioner must satisfy "the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact to invoke a federal court's jurisdiction."[8] *Young v. City of Simi Valley*, 216 F.3d 807, 815 (9th Cir. 2000). In *Rock Against Racism*, this Court stated:

> As a threshold matter, **it is far from clear that respondent should be permitted to bring a facial challenge** to this aspect of the regulation. **Our cases permitting facial challenges to regulations that allegedly grant officials unconstrained authority to regulate speech have generally involved licensing schemes** that "ves[t] unbridled discretion in a government official over whether to permit or deny expressive activity." . . . . Since respondent does not claim that city officials enjoy unguided discretion to deny the right to speak altogether, it is open to question whether respondent's claim falls within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority.

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[8] The requirements of Article III, Section 1, of the United States Constitution differ from the "substantially affected" test to bring a rule challenge under the Florida Administrative Procedure Act. (*See* Init. Brief at 29.)

*Ward v. Rock Against Racism*, 491 U.S. 781, 793 (1989) (emphasis added) (citing *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988)).

An important distinction between this rule and the government action at issue in most of the cases cited by Petitioner is that this rule sets up no permitting or licensing scheme or any other prior restraint on speech. Although park visitors may consult park officials about where, when, and how to conduct an expressive activity, they need not do so. On its face, the rule provides no penalty for failing to follow an official's instructions, only for actually creating a safety hazard or interference with other park activities.[4] Because the Department's rule includes no form of prior restraint, all Petitioner's citations to cases invalidating prior restraints on speech are of limited relevance. *See, e.g., Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992) (permit ordinance); *Plain Dealer*, 486 U.S. 750 (permit ordinance); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (ban on distribution of literature); *Shuttlesworth v. City of Birmingham*, 394 U.S.147 (1969) (permit ordinance); *Naturist Society, Inc. v. Fillyaw*, 958 F.2d 1515 (11th Cir. 1992) (permit rule); *United States v. Doe*, 968 F.2d 86 (D.C. Cir. 1992) (prohibition of certain decibel level in national parks); *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981) (permit ordinance). In the present case, because

[4] Whether the letter included in Petitioner's Appendix, (Init. Brief at 28), indicates otherwise is not before the Court since Petitioner abandoned his challenge to this letter; however, if the letter did indicate that Petitioner could be penalized simply for failing to follow instructions, it would be inconsistent with the language of the rule itself.

state park officials have no authority to prevent a communication from occurring, they are not censors. *See Rock Against Racism*, 491 U.S. at 795 n.5 (explaining "prior restraint").

First Amendment cases often distinguish between forbidding expression based on *anticipated* problems versus sanctioning *actual* abuse presently occurring. *See, e.g., Beckerman v. City of Tupelo*, 664 F.2d 502, 510 (5th Cir. 1981) (stating that punishment for exercise of First Amendment rights "must be based on a present abuse of rights, not a pre-nascent fear of future misconduct"); *Fernandes*, 663 F.2d at 628 (stating that *prospective* restraints are unconstitutional, but the government may punish an actual "abuse of the privilege to use a public forum"). The rule in question here only sanctions *actual* abuse. At this point it is only "conjectural" to anticipate that Petitioner's exercise of his rights to freedom of speech will be sanctioned based on this rule. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 304 (1979) (rejecting challenge to a statute as "not justiciable"). As in *Grayned*, a decision whether a free speech activity actually disrupts normal activities must be made "on an individualized basis, given the particular fact situation," and if the Government applies a facially neutral time, place, and manner regulation unconstitutionally the courts may deal with that case when it comes. *Grayned v. City of Rockford*, 408 U.S. 104, 119, 121 n.50 (1972) (upholding antinoise

ordinance forbidding disruption of schools while in session).[5]

## II. THIS FACIAL CHALLENGE SHOULD BE DENIED REVIEW BECAUSE THE STATE COURT NARROWLY CONSTRUED THE RULE.

This Court has held that a state statute should not be deemed facially invalid unless it is "not readily subject to a narrowing construction by the state courts. . . ." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975); *see also Wiegand v. Seaver*, 504 F.2d 303, 305 (5th Cir. 1974) (indicating that a statute may be upheld when "it has been authoritatively construed by state courts to limit its application solely to that speech which the state may constitutionally regulate"). This Court has held that the absence of a narrowing construction by a state court is a "*critical fact*" in determining that a law is insufficiently specific. *City of Chicago v. Morales*, 527 U.S. 41, 61 (1999) (invalidating a gang loitering ordinance) (emphasis added); *see also Coates v. City of Cincinnati*, 402 U.S. 611, 612 (1971) (invalidating ordinance restricting assembly where no narrowing construction was provided by the state court).

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[5] Petitioner is incorrect in contending that an as-applied challenge to the rule would be impossible because of deference to agency discretion under Florida's Administrative Procedure Act. (Init. Brief at 29.) Even in an administrative appeal, the court must remand or set aside an action if "[t]he agency's exercise of discretion was . . . in violation of a constitutional . . . provision. Fla. Stat. § 120.68(7) (Init. Brief App. at 17-18).

In the present case, the state court narrowly construed the rule in question to prohibit only activities that actually create a safety hazard or physically interfere with other visitors' uses of the park, such as blocking a nature trail or using sound amplification near a nesting site. *Frandsen*, 829 So. 2d at 271. Thus, authoritatively and narrowly construed by the state court, the rule gives "the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *See Grayned*, 408 U.S. at 108. The rule may not be used to avoid "the discomfort and unpleasantness that always accompany an unpopular viewpoint"; rather, the "prohibited disturbances are easily measured by their impact on the normal activities" at the particular location. *Id.* at 117, 112. Given the state court's narrowing construction of the park rule in this case, there is no "compelling reason" for this Court to grant review. *See* Sup. Ct. R. 10.

## III. THIS FACIAL CHALLENGE SHOULD BE DENIED REVIEW BECAUSE THE STATE COURT FOLLOWED THE PRECEDENTS OF THIS COURT AND FEDERAL APPELLATE COURTS.

As to Petitioner's first sub-issue (public forum), there is no case or controversy for this court to review because the state does not dispute that Florida parks are public fora. (*See* Init. Brief at 12-13.) Nor is there dispute that even in a public forum speech may be subject to reasonable time, place, and manner restrictions. (*See* Init. Brief at 18); *see also Rock Against Racism*, 491 U.S. at 792 (upholding restrictions on noise levels in particular area of city park in order "to retain the character of the Sheep Meadow and its more sedate activities"). This Court has

stressed the government's interest in protecting public parks and keeping them available to all the people. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984). The state court cited these cases and followed these principles. *Frandsen v. Department of Environmental Protection*, 829 So. 2d 267, 269-71 (Fla. 1st DCA 2002).

As to Petitioner's remaining sub-issues, the state court followed the precedents of this Court and federal appellate courts in upholding the rule. This Court has upheld content-neutral regulations intended "to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous. . . . " *Thomas v. Chicago Park District*, 534 U.S. 316, 780 (2002). Time, place, and manner regulations "stand on a different footing from laws prohibiting speech altogether." *Messer v. City of Douglasville*, 975 F.2d 1505, 1512 (11th Cir. 1992). Such regulations are upheld provided that they are "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information." *Rock Against Racism*, 491 U.S. at 791 (quoting *Community for Creative Non-Violence*, 468 U.S. at 293); *accord, Naturist Soc'y, Inc. v. Fillyaw*, 958 F.2d 1515, 1523 (11th Cir. 1992).[6]

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[6] Contrary to Petitioner's assertions, (Init. Brief at 20), the state court also followed federal precedent with regard to the burden of proof. Although Petitioner's challenge to the validity of the rule under the Florida Administrative Procedure Act placed the burden on Petitioner, (Final Order, Init. Brief App. at 41), Petitioner's *constitutional* challenge placed the burden on the state to justify the rule. *See Frandsen*,

(Continued on following page)

This Court has stated that the principal inquiry "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Rock Against Racism*, 491 U.S. at 791. In the present case, the state court held that the Department's intent was for its rule to be content-neutral, regulating only the time, place, and manner of park visitors' activities. *Frandsen*, 829 So. 2d at 271. The rule's intent was not to sanitize content, but rather to ensure that free speech activities would be accommodated in Florida state parks. (Final Order, Init. Brief App. at 37.) As narrowly construed by the state court, the rule may not be used to sanction anyone for offending bystanders by a controversial message, only for physically interfering with normal park activities at the particular location. *See Grayned*, 408 U.S. at 117, 112. Thus, Petitioner's "heckler's veto" argument is inapposite. (*See* Init. Brief at 16.)

The state court followed this Court's precedents in holding that the rule advances significant government interests. The government has a "substantial" interest in maintaining parks "in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence." *Community for Creative Non-Violence*, 468 U.S. at 296; *see also Kunz v. New York*, 340 U.S. 290, 293-94 (1951) (invalidating a licensing scheme, but noting that the government may prevent "serious interference with normal usage of streets and parks"). The government has a significant interest in avoiding disruption of other activities by those who use the

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829 So. 2d at 269 (stating that government restrictions on speech "must be justified").

parks. *Cf. Jews for Jesus*, 482 U.S. at 574 (indicating that the government could regulate expressive activity "that might create problems such as congestion or the disruption of the activities of those who use" the airport). The Department also has a significant interest in keeping sidewalks free of congestion and ensuring "free and safe public passage on the streets." *See Bery v. City of New York*, 97 F.3d 689, 697 (2d Cir. 1996). Time, place, and manner regulations are allowed in order to avoid overburdening traffic flow and to prevent conflicting parades in the same place or overloud speakers in a peaceful place. *Grayned*, 408 U.S. at 115-16. Under federal precedents, the Department's rule prohibiting safety hazards and interference with other park activities protects significant state interests.

The federal courts are reasonably lenient in reviewing content-neutral rules as to whether they are "narrowly tailored" to advance a significant state interest. *See Bery*, 97 F.3d at 696 (noting that strict scrutiny is used for content discrimination, but a more lenient standard for content-neutral regulations). This criterion is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Rock Against Racism*, 491 U.S. at 799. The words of a law may be characterized by "flexibility and reasonable breadth rather than meticulous specificity" if it is clear what the law as a whole prohibits. *Grayned*, 408 U.S. at 110. Some deference is given to a governmental entity "in determining how much protection is necessary and the best method of achieving that protection. . . ." *Harnish v. Manatee County*, 783 F.2d 1535, 1539 (11th Cir. 1986) (upholding ban on portable advertising signs). This Court has declared that it is not the province

of the judiciary "to judge how much protection of park lands is wise and how that level of conservation is to be attained." *Clark*, 468 U.S. at 299 (upholding park rule in face of First Amendment challenge).

The parks' free speech rule meets this standard. It advances the government's substantial interest in promoting the safety of humans and habitat and managing conflicting park uses, while welcoming free speech activities. These interests would be achieved less effectively without the regulation. Although parks are a public forum, this does not mean that every manner of free speech activity is suitable at every location and time within each of Florida's 155 parks. *See Naturist*, 958 F.2d at 1523 (noting that park managers may consider "the special character of public beaches"); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 533-34 (1981) (Brennan, J., concurring) (stating that billboards likely could be banned entirely in Yellowstone, "where their very existence would so obviously be inconsistent with the surrounding landscape"). Whether a type of demonstration will be disruptive depends on "[t]he nature of a place, 'the pattern of its normal activities.'" *Grayned*, 408 U.S. at 116; *accord, United States v. Doe*, 968 F.2d at 91 ("the nature and purposes of the setting, along with its ambient characteristics"). These are precisely the criteria that guide park managers' discretion under this rule.

Finally, this rule leaves open ample alternative channels of communication. *See Rock Against Racism*, 491 U.S. at 802 (finding this requirement "easily met" where no showing was made that remaining avenues of communication were inadequate). The purpose of the rule is to *encourage* free speech activities in the parks. (Final Order, Init. Brief App. at 37.) In fact, the only evidence allegedly

showing frustration of expressive activity in Florida state parks involves park managers' efforts to enforce the nudity ban, which is not at issue in this case. (Tr. at 156, 161.) The park rule is a valid time, place, and manner regulation. On balance, it "furthers, rather than constricts, free speech." *See Thomas*, 534 U.S. at 325.

None of Petitioner's allegedly conflicting cases are pertinent to this facial challenge to the park rule. Some address content discrimination. *E.g., Keyshian v. Board of Regents*, 385 U.S. 589 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964). Some address laws with no narrowing state court interpretation. *E.g., Morales*, 527 U.S. 41. Most address systems of prior restraint on speech. *E.g.*, cases listed at 7, *supra*. The remainder address *as-applied* challenges to the law. *E.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995); *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); *National Association of Colored People v. Button*, 371 U.S. 415 (1963). This Court has stated that a law should not be stricken facially unless it is *substantially* defective. *Erznoznik*, 422 U.S. at 216; *accord, Fernandes*, 663 F.2d at 633. There is no compelling reason for this Court to grant review.

## CONCLUSION

The park rule in question requires no form of prior permission for communicative activities, has been narrowly construed by the state court, and is content-neutral. In rejecting Petitioner's facial challenge to the rule, the state court properly stated and applied the rule of law for

time, place, and manner restrictions on speech. Certiorari review should be denied

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Respectfully submitted,

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No. 03-211

In The

# Supreme Court of the United States

DR. MARVIN FRANDSEN,

*Petitioner,*

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION, STATE OF FLORIDA,

*Respondent.*

**On Petition For Writ Of Certiorari To The First District Court Of Appeal For The State Of Florida**

## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## ARGUMENT

### I. PETITIONER HAS STANDING TO BRING THIS FACIAL CHALLENGE

The DEP argues that Petitioner Frandsen has only a conjectural interest because Frandsen hasn't been arrested yet for creating an "actual abuse." This argument is invalid for two reasons.

First, this Court has stated that the essence of the standing requirement is whether the plaintiff has alleged a "personal stake". However, the injury may be "indirect" so long as it is "fairly traceable to the defendant's acts or omissions." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 260-61 (1977).

Here, Frandsen has established that as an activist he has a continuing interest in conducting free speech activities in Florida state parks. Frandsen has established that the DEP has untrammeled discretionary power to make and enforce "time, place and manner" restrictions on speech up to and including the power to effectively prohibit speech altogether.

Frandsen has established that the DEP's power under color of the Rule has chilled his own speech and chills the speech of others to whom Frandsen wishes to be an audience.

Frandsen has established that the DEP under color of the Rule has issued unconstitutional and illegal commands and faces no restraints against doing so again. These illegal commands will be virtually unreviewable in state courts.

This Court has established that standing exists to bring a pre-enforcement facial challenge without demonstrating to an absolute certainty that the plaintiff will be prosecuted. A showing of 'an actual and well-founded fear that the law will be enforced' is sufficient. This is particularly true when the alleged harm, as here, includes the threat of self-censorship and the self-censorship of others. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988).

The 11th Circuit has recently stated that "no authority even remotely suggests that proximate causation applies to

the doctrine of standing. . . . even harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes." *Focus on the Family v. Pinellas Suncoast Transity*, No. 02-14442, 2003. C11.0000300, P. 44 (11th Cir. 2003) (Versuslaw).

Second, the DEP may not on appeal assert that Frandsen's interest in the Rule is only "conjectural" when at the outset of this case the DEP stipulated to Frandsen's standing to conduct a facial rule challenge as a "substantially affected" person under § 120.56(3), Florida Statutes (Pet. 29). (See also § 120.52(12), a "Party" is defined as "specifically named persons whose substantial interests are being determined in the proceeding.") In stipulating to Frandsen's standing to make a facial rule challenge the DEP has *de jure* already admitted that Frandsen's interests are legally substantive and not conjectural.

## II. THE LOWER STATE COURT CONSTRUCTION HAS NOT CURED THE RULE'S UNCONSTITUTIONALITY

The DEP vastly overstates the amount of narrowing construction conducted by the lower state court. The lower state court narrowed only one single aspect of only one clause within the Rule – the "public enjoyment clause." The narrowing performed on the "public enjoyment clause" of the Rule was limited to the interpreting "enjoyment" so as to remove overt consideration of public enjoyment (or lack thereof) of message content. However all other aspects of public "enjoyment," and all other clauses of the Rule were left un-narrowed by the lower state court (A. 80-81).

The lower state court did not construe the Rule to address any of the constitutional challenges brought to this Court in Frandsen's Petition for Certiorari.

Of particular note is the failure of the lower state court to construe the Rule so as to avoid the delegation of unbridled discretion to DEP employees, a pervasive issue throughout the Petition.

## III. THE DEP'S ANALYSIS REGARDING TIME, PLACE AND MANNER REGULATION FAILS TO REACH THE ISSUES RAISED IN THE PETITION

The DEP significantly does not dispute that Florida parks are public fora (Opp. Brief at 9).

The DEP's discussion of time, place and manner regulation under the traditional three-prong analysis (content neutrality, narrow tailoring, alternative avenues of communication) completely misses the Petition's establishment of the fact that the Rule is not a time, place and manner regulation of speech (Pet. 6-7). The Rule only delegates authority to park managers and park police to create *ad hoc*, case-by-case restrictions on speech. Any specific restriction created by a DEP employee might be analyzed under the standard three-prong test. However such analysis is inapplicable to the Rule itself because there are no specific restrictions to analyze. Further, Frandsen is not challenging the Rule via the three-prong test except insofar as unbridled discretion may interact with the test.

## IV. THE DEP'S "ACTUAL ABUSE" DEFENSE IS INVALID

Before this Court the DEP argues that the Rule "provides no penalty for failing to follow an official's instructions, only for actually creating a safety hazard or interference with other park activities" (Opp. Brief 6).

Contrary to the above statement the DEP has clearly on record represented that park managers and police can and do issue proactive prohibitions that are legally enforceable under color of the Rule (Pet. 6-7). In the court record the DEP has repeatedly stated and stipulated that legally enforceable restrictions are placed under color of the Rule on an *ad hoc*, case by case basis. The letter to Frandsen – issued by DEP attorneys representing the DEP – is only an example of clearly stated prohibitions issued under color of the Rule, where arrest is threatened if DEP prohibitions are violated (Pet. 5).

Even if *arguendo* the DEP's (current) interpretation of the Rule's action is accepted, the actual abuse defense is disingenuous. Whether or not a speaker actually creates as "safety hazard" or "interferes" with park activities is entirely dependent on a park manager or park policeman's personal opinion about unfathomable criteria as to what constitutes a "hazard" and what constitutes "interference" given that "interference" means anyone's discomfort for any reason, and that "park activities" literally mean anything and everything going on in a park (Pet. 6).

Only an extremely stalwart – and foolhardy – speaker would disobey a prohibition issued by a government official on the theory that only "actual" abuse would be prosecuted, when the determination of "actual abuse" is left entirely to the subjective opinion of the same official who issues the prohibition. The DEP's "actual abuse" defense is legally and in reality quite meaningless.

## V. THIS COURT SHOULD GIVE FULL REGARD TO THE COURT RECORD

Because the court record contradicts the DEP's position, the DEP repeatedly urges this Court to ignore the court record (Opp. Brief 1, 6). This Court should not accept the DEP's invitation.

First, the DEP misrepresents the status of the case. Frandsen never "abandoned his challenge to this letter" (Opp. Brief 6) or any other evidence in the court record. All evidence entered into the court record was entered with full cognizance by the Administrative Law Judge that only a facial rule challenge, and likely constitutional challenge on appeal, was before that court (Tr. 10-11, 83, 104, 428, 436 "the purpose of this hearing is to make a record for your constitutional challenge, should you decide to make that in the appellate court.")

Second, a Florida administrative law judge does not have jurisdiction to make findings related to a constitutional challenge (A. 53, Finding of Fact # 70).

Third, this Court has stated that in First Amendment cases appellate courts have an affirmative duty to make an independent examination of the court record without deference to lower court findings (Pet. 21).

## VI. WHY THIS COURT SHOULD GRANT CERTIORARI

This Court recently reaffirmed that "even contentneutral time, place and manner restrictions can be applied in such a manner as to stifle free expression.... We have thus required that a time, place and manner regulation contain adequate standards to guide the official's discretion and render it subject to effective judicial review." *Thomas v. Chicago Park District*, No. 00-1249, 2002.SCT. 0000013, P. 30 (U.S. 2002) (Versuslaw).

However, as in *Thomas, supra,* this Court's rulings opposing unbridled discretion in time, place and manner regulation of speech have occurred in the context of permit challenge cases. Because of this historical entanglement the DEP believes it has a free pass to exercise unbridled *ad hoc* discretion to restrict time, place and manner of speech as long as the DEP acts outside of a permit scheme.

The need for direction from this Court is illustrated by the opinion of the lower state court in this case which, sans a permit scheme, perfunctorily applied the threeprong test examined in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), without giving any consideration to the effects of unbridled discretion.

This case presents this Court with an opportunity to disentangle permit scheme issues from time, place and manner regulation questions. This Court should make a clear statement to lower courts, legislators and agencies that the U.S. Constitution operates outside as well as inside of a permit scheme. When regulating time, place and manner of speech officials may not arbitrarily dispense with constitutional guarantees of due process, equal protection, and First Amendment guarantees.

Respectfully submitted,
DR. MARVIN FRANDSEN, *Petitioner, pro se*